

IN THE SUPREME COURT OF THE UNITED STATES

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1 IN THE SUPREME COURT OF THE UNITED STATES
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3 SOUTHWEST AIRLINES CO.,)
4 Petitioner,)
5 v.) No. 21-309
6 LATRICE SAXON,)
7 Respondent.)
8 - - - - -
9
10 Washington, D.C.
11 Monday, March 28, 2022
12
13 The above-entitled matter came on for
14 oral argument before the Supreme Court of the
15 United States at 11:43 a.m.
16
17 APPEARANCES:
18
19 SHAY DVORETZKY, ESQUIRE, Washington, D.C.; on behalf
20 of the Petitioner.
21 JENNIFER D. BENNETT, ESQUIRE, San Francisco,
22 California; on behalf of the Respondent.
23
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1	C O N T E N T S	
2	ORAL ARGUMENT OF:	PAGE:
3	SHAY DVORETZKY, ESQ.	
4	On behalf of the Petitioner	3
5	ORAL ARGUMENT OF:	
6	JENNIFER D. BENNETT, ESQ.	
7	On behalf of the Respondent	38
8	REBUTTAL ARGUMENT OF:	
9	SHAY DVORETZKY, ESQ.	
10	On behalf of the Petitioner	71
11		
12		
13		
14		
15		
16		
17		
18		
19		
20		
21		
22		
23		
24		
25		

1 P R O C E E D I N G S

2 (11:43 a.m.)

3 CHIEF JUSTICE ROBERTS: We'll hear
4 argument next in Case 21-309, Southwest Airlines
5 versus Saxon.

6 Mr. Dvoretzky.

7 ORAL ARGUMENT OF SHAY DVORETZKY

8 ON BEHALF OF THE PETITIONER

9 MR. DVORETZKY: Mr. Chief Justice, and
10 may it please the Court:

11 Section 1 of the FAA exempts only
12 classes of workers that work on an
13 instrumentality of foreign or interstate
14 commerce, like a plane, ship, or train, as it
15 moves goods or people across borders.

16 That rule follows from Circuit City
17 and Section 1's text and structure. Circuit
18 City held that the exemption reaches only
19 classes of workers engaged in foreign or
20 interstate transportation. As then Judge
21 Barrett held in Wallace, that means an exempted
22 class of workers must perform work analogous to
23 that of seamen and railroad employees.

24 Seamen and railroad employees' key
25 characteristic was working on ships and trains.

1 We know that because "seamen" was a term of art.
2 It meant workers who predominantly worked on a
3 vessel. Vessels, by definition, transported or
4 were capable of transporting goods or people
5 over water. And the paradigmatic seamen, as the
6 Court noted in *Chandris*, sailed long voyages.

7 That made seamen as a class actively
8 engaged in foreign or interstate transportation.
9 Critically, seamen did not include land-based
10 maritime employees. By specifying seamen,
11 Congress excluded stevedores, who are land-based
12 cargo loaders.

13 Now Saxon says the exemption covers
14 the entire airline industry. But Section 1
15 exempts classes of workers, not industries,
16 engaged in foreign or interstate transportation.
17 It says "seamen," not maritime employees. It
18 repeats "foreign or interstate," emphasizing
19 border crossing. And placed among these other
20 words, "railroad employees" similarly means
21 workers who perform their duties on the train.

22 Saxon is not exempt from the FAA.
23 Cargo loaders don't work on planes, just as
24 stevedores didn't work on ships. They load
25 cargo before other classes of workers, like

1 seamen and pilots, do the foreign or interstate
2 transportation. They may facilitate
3 transportation, but that's not the test Circuit
4 City requires.

5 I'm happy to take the Court's
6 questions.

7 CHIEF JUSTICE ROBERTS: Counsel, in
8 your brief and in your -- your opening here, you
9 seem to be very -- being very precise in one of
10 your phrases. You -- you say emphasizing border
11 crossing in -- in determining interstate
12 commerce.

13 Does your test require that the worker
14 who wants to be covered actually cross the
15 border?

16 MR. DVORETZKY: No, it does not. The
17 question, as then Judge Barrett explained in
18 Wallace, is whether movement of people or goods
19 through the channel of interstate commerce is
20 central to the job of the class of workers.

21 So you might have a particular worker
22 within that class who, on a particular day,
23 doesn't cross borders. But -- but the question
24 is whether -- whether -- the question is whether
25 border crossing and this kind of transportation

1 analogous to what seamen and railroad employees
2 did is central to the -- the job of the class of
3 workers.

4 CHIEF JUSTICE ROBERTS: Well, okay, so
5 what you're saying is you might have a worker in
6 a particular function who doesn't cross the
7 border, but if the other people on his team do,
8 then he -- it's okay?

9 MR. DVORETZKY: Well, I -- I -- I
10 think, in that hypothetical, Mr. Chief Justice,
11 it depends on whether your hypothetical worker
12 is in the same class of workers as the others on
13 the team.

14 When you're talking about a class of
15 ramp agent supervisors, they -- they all have
16 the same job description, and their job
17 description doesn't involve getting on the plane
18 and --

19 CHIEF JUSTICE ROBERTS: Yeah, well,
20 let's say it's a group and, you know -- but only
21 the -- the most senior members of the group are
22 the ones that do the actual border crossing, and
23 then the others have to, you know, have put in
24 three or four years at the junior position that
25 isn't crossing the border, but then they'll

1 eventually be on that.

2 I'm trying to figure out, when you say
3 emphasizing border crossing, exactly what you're
4 trying to sweep under the rug.

5 MR. DVORETZKY: So --

6 CHIEF JUSTICE ROBERTS: I don't mean
7 that in a pejorative sense.

8 (Laughter.)

9 MR. DVORETZKY: I think, when --
10 Congress emphasized border crossing by repeating
11 the words "interstate" -- "foreign or
12 interstate" before "commerce." And so the
13 particular type of commerce that is at issue has
14 to involve border crossing of the sort, again,
15 that seamen and railroad employees did.

16 You might have some seamen who didn't
17 cross borders, but if the class --

18 CHIEF JUSTICE ROBERTS: But they would
19 be -- they would be covered?

20 MR. DVORETZKY: They would be covered.
21 They -- they would be covered. And, you know,
22 as for why that makes sense, this is like the
23 dull knives point that -- that Judge Bress made
24 in dissent in the Ninth Circuit. Knives as a
25 sharp -- as a class are sharp. You might have a

1 dull knife. It's still a knife. You might have
2 a seamen that doesn't cross borders, but because
3 the -- the -- the central characteristic of
4 seamen is to travel on ships and to do so
5 typically across borders, that's what satisfies
6 the Section 1 exemption.

7 And so, when we're looking at another
8 class of workers, like ramp agent supervisors
9 here, the question that we're asking is whether
10 the work they do is analogous to that.

11 CHIEF JUSTICE ROBERTS: Thank you.
12 That's very helpful.

13 JUSTICE SOTOMAYOR: Counsel, I see
14 your main argument, and you've repeated it again
15 today, is that stevedores weren't considered
16 seamen, but cargo loaders were considered
17 railroad workers.

18 And in New Prime, we noted that one of
19 Congress's purpose for exempting transportation
20 workers was that there were special arbitration
21 proceedings with respect to railroad workers and
22 seamen.

23 Why isn't it longshoremen, the -- the
24 Longshore Harbors Act has worker's compensation
25 for stevedores. So it would have surprised me

1 for Congress to have mentioned the seamen and
2 stevedores in that list of two transportation
3 workers because stevedores weren't even in the
4 arbitration realm. Is that correct?

5 So why don't I look at what was within
6 the definition of railroad workers, which
7 included cargo handlers?

8 MR. DVORETZKY: Justice Sotomayor, I
9 think the -- the term "railroad employees," read
10 in isolation, not in the context of Section 1,
11 could include cargo loaders, but it doesn't have
12 to. And so, when there are competing --

13 JUSTICE SOTOMAYOR: Well, stevedores
14 are a part of commerce, we said, in Puget Sound,
15 as much as the crew on the train. So cargo
16 handlers on the railroad are equally part of
17 transportation commerce. So I don't see the
18 difference.

19 MR. DVORETZKY: Well, I don't think
20 that the Commerce Clause cases like Puget Sound
21 are really instructive for the question here for
22 a couple of reasons.

23 One, in Puget Sound, the Court was
24 relying on Haverty for the notion that -- for
25 the notion that seamen included stevedores.

1 Haverty, as this Court later recognized in
2 Chandris and Wilander, was wrongly decided. And
3 the -- the -- as the Court reiterated in
4 Chandris and Wilander, the fundamental -- the
5 fundamental characteristic of seamen is
6 predominantly spending time on the ship.

7 And as the Court noted in Chandris and
8 Wilander, in Haverty, which, again, is the case
9 that Puget Sound relies on, the Court was using
10 seamen not in its common -- common understanding
11 to include stevedores.

12 In addition to that, Puget Sound
13 relied on Burch, which is a FELA case, and FELA
14 for a number of reasons is -- not instructive
15 here as well. The statutory text is different.
16 The decisions interpreting FELA were by their
17 very terms atextual and rather purposive looking
18 at the broad purpose of FELA.

19 JUSTICE SOTOMAYOR: The phrase is
20 "except for workers engaged in foreign and
21 interstate commerce."

22 If we define cargo handlers as
23 involved in interstate commerce and seamen and
24 longshoremen were also considered involved in
25 commerce, maybe not interstate because there's

1 no question most ships, not all, but virtually
2 all travel in interstate commerce, why doesn't
3 the same apply here, that cargo handlers do as
4 well?

5 MR. DVORETZKY: Because the -- the
6 commerce cases like Puget Sound are not
7 answering the same question that is at issue
8 here. They are not interpreting the statutory
9 term "engaged in foreign or interstate
10 commerce," which, as this Court said in Circuit
11 City, is a term of art.

12 They are also, in addition -- they are
13 answering a different question. They're talking
14 about what is the full extent of Congress's
15 commerce power and how does that interact with
16 the state's authority.

17 The Court said in Circuit City that
18 the scope of Section 1, the Section 1 exemption,
19 does not reach the full extent of Commerce
20 Clause power. That's simply the wrong question
21 under Circuit City.

22 And so, when the Court is saying in
23 these cases like Puget Sound that stevedores are
24 a part of interstate commerce, they're doing so
25 in a very different context that's not

1 instructive here.

2 JUSTICE GORSUCH: Counsel, let's say I
3 -- I agree with everything you just said, but I
4 still have a question about folks who unload
5 cargo from interstate commerce and bring it into
6 the state.

7 Now what evidence is there that
8 railroad workers who did that were or were not
9 covered by this statutory language? And, if
10 they were covered by it, do you lose?

11 MR. DVORETZKY: Well, if -- if I may
12 -- if I may just clarify the question. When
13 you're asking if they're covered by the --

14 JUSTICE GORSUCH: You can try.
15 (Laughter.)

16 MR. DVORETZKY: If they're -- if
17 you're asking about the statutory language --

18 JUSTICE GORSUCH: Yes.

19 MR. DVORETZKY: -- are you referring
20 to whether they are covered by the Section 1
21 exemption?

22 JUSTICE GORSUCH: Yes.

23 MR. DVORETZKY: Okay. So, again,
24 railroad employees, if you just read it in
25 isolation, could mean any number of things.

1 JUSTICE GORSUCH: I -- I know -- I
2 know you like to talk about people who travel,
3 okay? And I'm saying put that aside.

4 What about the fellow who unloads
5 cargo that's come in interstate commerce from
6 the railroad and then hands it off to a carrier
7 locally, that person, and if that person was
8 exempted by the act, then why isn't the same
9 person unloading cargo from a plane in the same
10 position?

11 MR. DVORETZKY: Well, Justice Gorsuch,
12 I don't think that person was exempted by
13 Section 1 --

14 JUSTICE GORSUCH: That's my question.

15 MR. DVORETZKY: That -- that -- that's
16 why I wanted to --

17 JUSTICE GORSUCH: What evidence do you
18 have of that?

19 MR. DVORETZKY: Well, so that's why I
20 wanted to clarify exactly what statute we're
21 talking about.

22 I don't think that person was exempted
23 by Section 1 because railroad employees can be
24 used any number of different ways. And if you
25 look, for example --

1 JUSTICE GORSUCH: I understand that.
2 I'm talking very specifically and historically,
3 in 1925, what evidence do you have?

4 MR. DVORETZKY: I -- I would look at
5 the Hours of Service Act and the Boiler
6 Inspection Act. I would look at the Erdman Act.
7 These are all statutes in which Congress used
8 railroad employees to mean something less than
9 everybody who works for the railroad.

10 Likewise, in United States versus
11 American Trucking --

12 JUSTICE GORSUCH: Did those things
13 specifically deal with the class of workers I'm
14 talking about, or are they just acknowledging
15 that, of course, the back-office accountant
16 sitting in New York is not engaged in interstate
17 commerce?

18 MR. DVORETZKY: Well, I -- I -- I
19 think those -- those statutes are actually
20 narrowing the class of railroad employees to --
21 to exclude far more than just the back-office
22 accountant. They --

23 JUSTICE GORSUCH: I'm talking about
24 the very particular class of workers that we
25 have at issue here, and -- and what evidence do

1 you have one way or the other with respect to
2 them, not -- not other people who do other
3 functions that have nothing to do with
4 interstate commerce?

5 MR. DVORETZKY: Well, I -- I -- I
6 don't think we have either evidence or a
7 definition either way of -- as to Section 1.

8 What we have, though, is statutory
9 context in which the term "railroad employees,"
10 first of all, can be used to mean less than all
11 railroad employees.

12 Second of all, it comes alongside the
13 word "seamen," not maritime employees. So that
14 shows us that Congress was not trying to exempt
15 everybody who works for a particular employer
16 but, rather, a specific class.

17 We have "engaged in foreign or
18 interstate commerce," which, as this Court said
19 in Circuit City, colors the understanding of
20 seamen and railroad employees.

21 We also have the language "class of
22 workers," which suggests, again, that we are
23 focusing on what workers do, namely, they -- the
24 workers in particular have to be engaged in
25 foreign or interstate commerce rather than

1 speaking broad --

2 JUSTICE GORSUCH: Okay. I'm going to
3 take all that as, no, I don't have any evidence
4 of the past, unless I'm misunderstanding
5 something, and then I'll ask you this question
6 if that's the case.

7 Why wouldn't we naturally understand
8 someone who is loading and unloading cargo from
9 interstate commerce to be involved in interstate
10 commerce within the meaning of this -- this Act,
11 narrowly, as a class of persons?

12 MR. DVORETZKY: Because such an
13 individual -- that would be a -- a sweeping
14 interpretation of Section 1.

15 JUSTICE GORSUCH: Well, you can call
16 it sweeping. You can call it narrow. Whatever
17 adjective or adverb you want to attach to it,
18 why wouldn't that be an appropriate reading of
19 this statute, counsel?

20 MR. DVORETZKY: Because the statutory
21 structure and text here suggests that Congress
22 had in mind a narrower understanding based on
23 all of the other cues that we are talking about.

24 If Congress meant -- rail -- railroad
25 employees can be read one of two ways. Seamen

1 can only be read one way. And so, therefore,
2 the understanding of seamen ought to help the
3 Court understand which understanding of railroad
4 employees is the right one.

5 In Neal versus Clark, for example, the
6 Court looked at the word "fraud." Fraud
7 standing on its own can mean either positive
8 fraud or implied fraud.

9 The Court read it to mean positive
10 fraud because it was used in the statute
11 alongside the word "embezzlement."

12 JUSTICE KAVANAUGH: What do you --

13 MR. DVORETZKY: So --

14 JUSTICE KAVANAUGH: -- do with -- keep
15 going. I'm sorry, keep going.

16 MR. DVORETZKY: Well, no, I was just
17 going to say so too here, railroad employees can
18 be read either way in isolation but should be
19 informed by seamen.

20 JUSTICE KAVANAUGH: And on workers
21 engaged -- class of workers engaged in foreign
22 or interstate commerce, what do you do with the
23 Burch case, which I realize is about FELA but is
24 dealing with similar language, "engaged in
25 commerce," and the Court said "it is too plain

1 to require discussion that the loading or
2 unloading of an interstate shipment by the
3 employees of a carrier is so closely related to
4 interstate transportation as to be practically a
5 part of it?" Which was, applying, of course, as
6 you know, the Shanks test, a closely related
7 test, to reach a conclusion. And that's 1924
8 when the Court says that.

9 So what do we do with that?

10 MR. DVORETZKY: So two points, Justice
11 Kavanaugh, one textual, the other
12 methodological.

13 Let me actually start with the
14 methodological point. You mentioned Shanks. In
15 Shanks, the Court said that it was interpreting
16 FELA not in a technical legal sense -- or it was
17 interpreting interstate commerce not in a
18 technical legal sense but in a practical one
19 better suited for the occasion.

20 Shanks by its terms is not a textual
21 opinion. It's a purposive opinion.

22 JUSTICE KAVANAUGH: Right. So we're
23 left -- I mean, I don't know if you listened to
24 the last case, but a similar situation where the
25 Court has a precedent interpreting the language.

1 And the question's whether, I think,
2 whether we should think that precedent makes
3 sense with the exact or very similar language in
4 another contemporaneous statute. And I guess
5 I'll let you keep going on that.

6 MR. DVORETZKY: Well, so Shanks took
7 one methodological approach, which was an
8 atextual one.

9 At the same time, in Circuit City, the
10 Court said the way to think about "engaged in
11 foreign or interstate commerce" is with
12 reference to the Gulf Oil and ABM cases, which
13 rejected the kind of closely connected standard
14 that Shanks adopted.

15 In addition to that -- I said I had
16 two points. That's the methodological. The
17 textual differences between FELA and Section 1
18 are also important. Obviously, FELA does not
19 have the kind of language that we have in
20 Section 1 about seamen and railroad employees
21 and a residual clause.

22 It doesn't use the word -- it doesn't
23 use the word "foreign or interstate commerce" in
24 the same way. It talks about a common carrier
25 engaged in trade or commerce.

1 JUSTICE KAVANAUGH: Between any of the
2 several states?

3 MR. DVORETZKY: Right. But it -- but
4 it doesn't have the same --

5 JUSTICE KAVANAUGH: That sounds like
6 interstate.

7 MR. DVORETZKY: It -- it's not the
8 same repetition of foreign or interstate that we
9 have here in the residual clause.

10 In addition to that, FELA focuses
11 first and foremost on the employer's business.
12 It talks about every common carrier by railroad
13 while engaging in commerce. So that is focusing
14 on the employer in a way that the Section 1
15 exemption is not.

16 And, lastly, when FELA gets to
17 employees, it talks about them in their
18 individual capacity, whereas the FAA addresses
19 classes of workers.

20 So, textually, there are a number of
21 differences here. And, methodologically, again,
22 when the Court was looking at FELA, it wasn't
23 doing so textually. It was doing so in a
24 purposive way. And Gulf Oil and ABM, which also
25 interpreted contemporaries of the FAA using

1 language like "engaged in foreign or interstate
2 commerce," they had a much narrower
3 understanding of what those words meant.

4 JUSTICE KAVANAUGH: But it's also
5 interesting the Court just says it's too plain
6 to require discussion, that loading and
7 unloading is -- you know, it's, like, so obvious
8 to the Court in 1924 that loading and unloading
9 is practically part of the interstate commerce.

10 MR. DVORETZKY: It -- it --

11 JUSTICE KAVANAUGH: That suggests an
12 understanding of the terms as of 1924.

13 MR. DVORETZKY: Only in the context of
14 a test that itself said that FELA was so broad
15 that it covered a vast field about which there
16 can be no discussion. That's a quote from the
17 Carr test.

18 JUSTICE GORSUCH: Well, if you want to
19 look more directly to the FAA, what do we do
20 about wharfage, which Section 1 speaks about as
21 agreements relating to wharfage or any other
22 matter in foreign commerce? Wharfage contracts,
23 as I understand them, not being an expert in
24 this area, have to do with the loading and
25 unloading of cargo. And if that is considered

1 in interstate or in foreign commerce for
2 purposes of Section 1, what do I do about that?
3 That seems a rather specific textual clue.

4 MR. DVORETZKY: So the reference to
5 wharfage comes up in the definition of maritime
6 transactions, not in the definition of commerce.
7 Congress in Section 1 was separating out
8 maritime --

9 JUSTICE GORSUCH: It says wharfage or
10 any other matters in foreign commerce. That's
11 what it says.

12 MR. DVORETZKY: It -- it does, but it
13 says that in the first part of Section 1
14 defining maritime transaction --

15 JUSTICE GORSUCH: I understand that.

16 MR. DVORETZKY: -- before it gets to
17 commerce.

18 JUSTICE GORSUCH: But it -- it -- it
19 considers a wharfage agreement to be a matter in
20 -- in foreign commerce.

21 MR. DVORETZKY: So --

22 JUSTICE GORSUCH: Do you wish to
23 address that?

24 MR. DVORETZKY: I do, and I disagree
25 with that grammatical understanding of the

1 statute as well because, if you look at
2 everything that come -- if you look at the words
3 that come after wharfage, for example, "supplies
4 furnished vessels or repairs to vessels" --

5 JUSTICE GORSUCH: Or any other matters
6 --

7 MR. DVORETZKY: Well --

8 JUSTICE GORSUCH: -- of foreign
9 commerce.

10 MR. DVORETZKY: -- "supplies furnished
11 vessels or repairs to vessels" are not something
12 that you can think of as being in foreign
13 commerce, which -- which suggests that "in
14 foreign commerce" is really just modifying
15 matters rather than characterizing everything
16 that came before.

17 It doesn't -- it doesn't make sense to
18 think of a -- a repair to a vessel as being in
19 foreign commerce. And if it did, what would
20 that mean? That everybody somehow associated
21 with the repair by virtue of -- of repairing a
22 vessel was in foreign commerce? That's a pretty
23 sweeping understanding of -- of foreign
24 commerce --

25 JUSTICE GORSUCH: I -- I understand

1 your point.

2 MR. DVORETZKY: -- contrary --
3 contrary to what Congress was doing in the rest
4 of the -- when it actually got to defining
5 commerce by specifying seamen, by repeating
6 "foreign or interstate" where it didn't need to
7 in order to underscore the significance there of
8 border crossing.

9 JUSTICE KAVANAUGH: Picking up on the
10 question on railroad employees that Justice
11 Gorsuch was asking, I think your theory is that
12 because "seamen" doesn't include everyone
13 involved in shipping, we should interpret
14 railroad employees not to interpret everyone
15 who's involved in loading and unloading the
16 railroad, the cars as well. Is that my --

17 MR. DVORETZKY: That's part -- that's
18 part of it, yes.

19 JUSTICE KAVANAUGH: And why not just
20 rail -- read "railroad employees" to mean
21 railroad employees?

22 MR. DVORETZKY: Well, so, first of
23 all, "railroad employees" doesn't have to mean
24 all railroad employees. And, in fact, it
25 typically doesn't. Even in the RLA, when it

1 refers to employees, it's not talking about
2 everybody who works for the railroad.

3 Management is excluded. The RLA and
4 the Transportation Act both distinguish between
5 employees -- subordinate officials and railroad
6 -- and management. And so just looking at the
7 term "railroad employees," the most natural
8 reading of that isn't everybody who works for
9 the railroad.

10 In addition to that, in Section --

11 JUSTICE KAGAN: And are you
12 acknowledging that if railroad baggage handlers
13 are covered, then you lose? There's no way to
14 separate those two out, is there?

15 MR. DVORETZKY: I think there is a way
16 to separate those two out. Even if railroad
17 baggage handlers are covered, that doesn't tell
18 you that Congress meant to exempt the entire
19 airline industry.

20 JUSTICE KAGAN: Well, I mean, we may
21 or may not be talking about the entire airline
22 industry, but at least airline ramp workers and
23 airline ramp supervisors. If railroad baggage
24 handlers are covered, is there any possible way
25 that air -- airline ramp workers would not be

1 covered?

2 MR. DVORETZKY: Yes, absolutely,
3 because even if you -- even if you ask me to
4 assume that railroad baggage handlers are
5 covered, we still have the fact that stevedores
6 are not covered by use of the word "seamen."
7 And so, at that point, we look at those two
8 words and maybe they point in other directions,
9 but how do you resolve that?

10 You still look at "engaged in foreign
11 or interstate commerce," which, under Circuit
12 City, is supposed to be given a narrow
13 construction. You still look at the fact that
14 the -- the Section 1 exemption is focusing
15 particularly on what the workers do rather than
16 on the employer more generally.

17 And, in addition to that, you ought to
18 interpret the Section 1 exemption consistently
19 with -- with the FAA's pro-arbitration purposes.
20 There's no reason to think that when Congress
21 passed this statute in 1925 that it meant to
22 leave a gap to cover a class of workers that
23 would not be covered by any other federal
24 regime for years later.

25 JUSTICE KAGAN: Didn't we say not to

1 do that in New Prime? I thought that that was
2 one of the points of New Prime, is that you
3 don't get to just wave around the FAA's purposes
4 in order to construe the scope of Section 1.

5 MR. DVORETZKY: I think you don't get
6 to use the FAA purposes to contradict the plain
7 language of Section 1. But, here, I think that
8 the language of Section 1 supports us and would
9 be informed by the broader understanding of what
10 Congress was trying to achieve in the FAA, which
11 was to promote rather than undermine
12 arbitration.

13 The -- the purpose of the Section 1
14 exemption that the Court attributed to Congress
15 in New Prime and Circuit City was not an
16 anti-arbitration purpose. It was a purpose to
17 make sure that the vast majority of individuals
18 are covered by Section 2, and to the extent that
19 you're saying --

20 JUSTICE KAGAN: Right. But whatever
21 the FAA's general purposes are, we read the
22 exception fairly. Isn't that the proper way to
23 read a statute? There are -- there's a general
24 -- there are general provisions and then there's
25 an exception where they thought that the general

1 provisions of the FAA did not apply, and we read
2 that exception fairly. Isn't that what we're
3 supposed to do?

4 MR. DVORETZKY: Of course, but I would
5 submit that it's not -- not a fair reading of
6 the exception here where you have a choice
7 between two -- two competing interpretations of
8 railroad employees in this context to choose the
9 broader understanding of railroad employees,
10 given, again, the juxtaposition with seamen,
11 given, again, the focus on engaging in foreign
12 or interstate commerce, and the understanding
13 that Circuit City attributed to that term in
14 this very statute to require direct
15 participation in the movement of goods or
16 services.

17 And, again, when we're looking at what
18 seamen did, I don't think you can just look at
19 railroad employees and ignore what seamen did.
20 I think you have to look at them together.

21 With -- and then, with respect to the
22 argument which we made here that the -- the
23 entire airline industry is covered by this,
24 again, the statute here doesn't speak in terms
25 of entire industries. It speaks in terms of

1 classes of workers and a focus on the work that
2 they do and, again, juxtaposing railroad
3 employees with seamen.

4 CHIEF JUSTICE ROBERTS: Thank you.
5 Justice Thomas?

6 JUSTICE THOMAS: Thank you, Mr. Chief
7 Justice. Just a couple of questions.

8 The -- you make quite a bit -- you --
9 you suggest that seamen have to actually travel
10 interstate or internationally, right?

11 MR. DVORETZKY: I think seamen as a
12 class, the only understanding of that class is
13 that they traveled interstate or
14 internationally, but, as I was trying to explain
15 to the -- to the Chief Justice at the beginning
16 of the argument, you could have an individual
17 seaman who didn't, yet that person would still
18 qualify as a seaman and fall under the
19 exemption.

20 JUSTICE THOMAS: Well, how would you
21 do that?

22 MR. DVORETZKY: I -- you would look at
23 -- you would look at the class of workers that
24 the individual belongs to, and if -- if the
25 class of workers is that of seamen, then you

1 look at the traditional maritime law
2 understanding of what a seaman was. And cases
3 like Chandris and Wilander tell us that the
4 fundamental characteristic of seamen as a class
5 was working on the vessel and typically crossing
6 borders. But that doesn't mean that if you have
7 an individual seaman who didn't cross borders
8 that they're excluded -- that they're excluded
9 from the exemption.

10 JUSTICE THOMAS: So let's just look at
11 tugboat operators as a class. Would they be
12 considered seamen?

13 MR. DVORETZKY: I think they would.

14 JUSTICE THOMAS: Why? They don't
15 travel internationally.

16 MR. DVORETZKY: They -- they don't,
17 but, nonetheless, they -- they satisfy the --
18 the basic conditions for the test under Chandris
19 and Wilander. They spend the predominant amount
20 of their time on a vessel, and the vessels that
21 they spend time on are -- move or are capable of
22 moving people or goods across -- across water.

23 The fact that they don't do so
24 internationally doesn't exclude them from the
25 class of seamen, given what the definition is

1 for "seamen" under this Court's case law and
2 under maritime law.

3 JUSTICE THOMAS: Okay. Give me again
4 your limiting principle for railroad employees
5 as a class.

6 MR. DVORETZKY: Railroad employees are
7 those who ride the rails. They're the people on
8 the train who move goods or people on the train.

9 Typically, that's going to be across
10 borders, but, as with the discussion we were
11 just having about seamen, you could have a
12 railroad -- you could have railroad employees
13 who don't cross borders as well.

14 JUSTICE THOMAS: So there -- there
15 used to be a train that ran just from Savannah
16 to Atlanta and back. Now it's a railroad. It's
17 a train. It has employees.

18 So I'm -- I'm trying to understand why
19 the employees on that dedicated intrastate train
20 would be treated differently from your class of
21 either internationally traveling or interstate
22 traveling employees?

23 MR. DVORETZKY: Justice Thomas,
24 because the employees who work on the train
25 between Savannah and Atlanta are not their own

1 class. The class of workers is still railroad
2 employees.

3 And, typically, railroad employees
4 cross borders, but there are some, as in your
5 example, who don't. That doesn't make them part
6 of a different class.

7 JUSTICE THOMAS: So you're basically
8 saying you have a definition of a class that
9 includes international or interstate travel and
10 that you may have exceptions to that. Isn't
11 that kind of an odd way to create a class?

12 MR. DVORETZKY: I -- I -- I don't
13 think it is because I think that's what followed
14 --

15 JUSTICE THOMAS: Why wouldn't it be
16 the opposite, that's what I'm asking, that the
17 class is broader than those who travel
18 internationally or nationally?

19 MR. DVORETZKY: I -- I -- I think I
20 would point you, again, to the use of the word
21 "seamen" in the statute. Seamen sometimes cross
22 borders and sometimes didn't, but Congress in
23 the statute didn't distinguish between those
24 different types of seamen. It just talked about
25 seamen as a general class.

1 And so, when you're talking about
2 railroad employees, you're also talking about
3 them as a general class whether the particular
4 railroad employee goes from D.C. to New York or
5 from Atlanta to Savannah.

6 JUSTICE THOMAS: So one last question,
7 and this is back to what Justice Gorsuch alluded
8 to, and that is wharfage. I'm having some
9 difficulty understanding your argument there
10 because that seems to suggest that as a part of
11 the maritime transaction that we're talking
12 about, it would include wharfage agreements, you
13 know, basically, shore agreements.

14 And you were giving -- I -- I don't
15 understand what your answer was to him.

16 MR. DVORETZKY: Justice Thomas, I
17 think the answer is that wharfage is part of
18 maritime transactions. But Section 1 separately
19 defines maritime transactions from commerce, and
20 the Section 1 exemption that we're talking about
21 here today is an exemption from the definition
22 of commerce, not from the definition of maritime
23 transactions.

24 JUSTICE THOMAS: Okay. Finally, if --
25 let's just move away from wharfage a section --

1 a second. What would you do with drayage that
2 continues a journey of, say, a container from
3 the airport if it's a FedEx/UPS container or if
4 it's intermodal and it comes in on a container
5 ship, but then it's taken 2- or 300 miles away?

6 MR. DVORETZKY: Well, I -- I think, if
7 it came in on a ship, at that point -- at that
8 point, you could conceivably fall within the
9 definition of seamen.

10 JUSTICE THOMAS: The drayage would be
11 considered a seamen?

12 MR. DVORETZKY: I -- I think it would
13 if -- if we're talking about moving across
14 water.

15 JUSTICE THOMAS: No, a drayage would
16 be moving to a truck to be hauled.

17 MR. DVORETZKY: Oh, oh, oh. So, no,
18 that -- that would not fall within the Section 1
19 exemption. That would not fall within the
20 Section 1 exemption because it is not part of
21 what the seamen -- the seamen's duties -- well,
22 it would depend, I suppose, who's doing that
23 work, right?

24 I mean, if -- if -- if you have the
25 seamen who are actually the ones unloading the

1 ship, then I think the fact that they carried
2 out some loading or unloading duties would not
3 take them out from the exemption.

4 But, if you have individuals analogous
5 to ramp agents or stevedores whose primary job
6 it is to be unloading the ship, then, no, under
7 the language of Section 1, they would not be
8 subject to the exemption, just as stevedores
9 were not, were excluded from -- from the class
10 of seamen.

11 JUSTICE THOMAS: Thank you.

12 CHIEF JUSTICE ROBERTS: Justice
13 Breyer?

14 Justice Alito?

15 Justice Sotomayor?

16 Justice Kagan?

17 JUSTICE KAGAN: Railway signal
18 operators, are they railway employees?

19 MR. DVORETZKY: Not within the meaning
20 of Section 1 because they're not riding the
21 train.

22 JUSTICE KAGAN: So, I mean, you know,
23 the train doesn't go unless those signal
24 operators are there going green light/red light,
25 right? But they're not railway employees within

1 the meaning of Section 1?

2 MR. DVORETZKY: Correct, because the
3 test is not how closely related or even how
4 necessary they are to transportation. The test
5 under Circuit City and under the language of
6 Section 1 is whether they actually are doing the
7 foreign or interstate transportation in the way
8 that seamen and railroad workers do.

9 Lots of different people are important
10 for transportation. You might need a travel
11 agent to book your ticket. You wouldn't get on
12 the plane if you don't know how to use a
13 computer without the travel agent.

14 That doesn't mean that the travel
15 agent is a transportation worker just because
16 they were necessary for you to get on that
17 plane.

18 JUSTICE KAGAN: So the -- the test is
19 are you moving?

20 MR. DVORETZKY: The -- the test is are
21 you moving on the -- the ship, the plane, the
22 truck, through the channels of interstate
23 commerce. That is what seamen and railroad
24 employees did.

25 JUSTICE KAGAN: Okay.

1 CHIEF JUSTICE ROBERTS: Justice
2 Gorsuch?

3 Justice Kavanaugh?

4 JUSTICE KAVANAUGH: Just -- I -- I
5 mentioned the Burch precedent, but the other
6 side cites a number of other pre-1925 cases,
7 like Gloucester Ferry, Crutcher, Easton, Texas
8 Transportation, in -- in other fields but in all
9 of them suggesting that loading and unloading is
10 part of interstate commerce.

11 So I don't know -- necessarily want
12 you to go one by one, but just what's your
13 response to that?

14 And they -- they say that just
15 reflects -- further demonstrates the common
16 understanding that loading and unloading is part
17 of interstate commerce.

18 MR. DVORETZKY: So I think those cases
19 were answering a different question. They were
20 not interpreting "engaged in foreign or
21 interstate commerce," which the Court said in
22 Circuit City was a term of art that has to be
23 given its plain meaning.

24 Many of those are dormant Commerce
25 Clause cases. So what's going on in those cases

1 is the Court is saying a state, let's say, can't
2 regulate the loading or unloading of cargo
3 because, without the loading or unloading of
4 cargo, the -- the interstate commerce can't
5 happen.

6 And so, in that situation, regulating
7 the loading or unloading is stopping the
8 interstate commerce from happening. That's
9 simply answering a different question than
10 whether the people doing the loading or
11 unloading are themselves engaged in foreign or
12 interstate commerce in the narrow way in which
13 Section 1 uses that term.

14 JUSTICE KAVANAUGH: Thank you.

15 CHIEF JUSTICE ROBERTS: Thank you,
16 counsel.

17 Ms. Bennett.

18 ORAL ARGUMENT OF JENNIFER D. BENNETT

19 ON BEHALF OF THE RESPONDENT

20 MS. BENNETT: Mr. Chief Justice, and
21 may it please the Court:

22 If Congress wanted to exempt from the
23 FAA just those workers aboard an instrumentality
24 of commerce crossing state lines, it easily
25 could have said so.

1 Instead, it excluded the employment
2 contracts of seamen, railroad employees, and any
3 other class of workers engaged in foreign or
4 interstate commerce.

5 This Court made clear in *New Prime*
6 that we interpret this exemption just as we
7 would any other statute, by the meaning of its
8 words at the time it was passed. Those words
9 exempt airline employees who load and unload
10 cargo.

11 Southwest can't dispute that by 1925
12 it was blackletter law that the transportation
13 of goods in commerce begins when they're given
14 to a carrier and it only ends when they're
15 received at their final destination.

16 Indeed, this Court had repeatedly held
17 that loading and unloading cargo specifically is
18 part of that transportation, not ancillary to
19 transportation or connected to transportation,
20 but it is itself transportation, that it is
21 itself commerce.

22 And just the year before the FAA was
23 passed, as Justice Kavanaugh pointed out, this
24 Court held that it was too plain to require
25 discussion that a worker who unloaded a train

1 was a railroad employee and that that railroad
2 employee was engaged in interstate commerce.

3 Yet Southwest contends that workers
4 who load and unload airplanes are not part of
5 any class of workers engaged in commerce for
6 purposes of the FAA.

7 There's no support for this contention
8 in the text of the statute. Southwest can't
9 point to even a single example from any time
10 period in which the phrase "engaged in foreign
11 or interstate commerce" has ever been given the
12 meaning it proposes.

13 So, instead, Southwest invokes the
14 statute's purpose. The FAA favors arbitration,
15 Southwest says, so the exemption must be given
16 as narrow a reading as possible regardless of
17 what the text actually means.

18 But this Court rejected that very
19 argument in *New Prime*. And even if we were to
20 privilege purpose over text, on Southwest's
21 interpretation, the exemption would do exactly
22 what *Circuit City* held it was designed to avoid,
23 unsettle developing and existing dispute
24 resolution regimes at the time.

25 I welcome this Court's questions.

1 CHIEF JUSTICE ROBERTS: What about
2 ticket agents? Are they included as transport
3 workers under your approach?

4 MS. BENNETT: Yes, Your Honor, in
5 1925 -- and by ticket agents, I assume you mean
6 people who work for the airline helping --

7 CHIEF JUSTICE ROBERTS: No, the -- the
8 person you, you know, go up and give your ticket
9 to and, yeah.

10 MS. BENNETT: Yes, Your Honor. In
11 1925, those people certainly would have been
12 railroad employees. If you look at, for
13 example, Decision Number 2 of the Railroad Labor
14 Board, which is the agency that set wages for
15 railroad employees at the time, you'll see those
16 people listed in the list of -- of employees.
17 Station employees were certainly included.

18 CHIEF JUSTICE ROBERTS: What about
19 somebody who isn't actually -- doesn't take your
20 ticket, doesn't put the little, you know, thing
21 on the bag, but is there at an office for the
22 airline in -- in the airport?

23 MS. BENNETT: I think it would depend
24 on what that person is doing. But -- but what
25 we know about railroad employees, the ordinary

1 meaning was those people who did the customary
2 work of the railroad at the time. And what that
3 meant was that anybody whose function was
4 contributory to the transportation of the
5 railroad rather than, say, negligible or --

6 CHIEF JUSTICE ROBERTS: Well, the
7 general counsel.

8 MS. BENNETT: The general --

9 CHIEF JUSTICE ROBERTS: The work is --
10 is, whatever you just said, supportive of the --

11 MS. BENNETT: Sure.

12 CHIEF JUSTICE ROBERTS: --
13 transportation or whatever.

14 MS. BENNETT: The general counsel is
15 likely not a railroad employee, and the reason
16 for that is because "railroad employees" and --
17 it excluded executives. There was really
18 this -- as -- as Mr. Dvoretzky pointed out,
19 there is a labor/management divide, just as
20 there is in any other class of workers.

21 And so, for that reason, the general
22 counsel likely wouldn't be excluded.

23 JUSTICE KAVANAUGH: In your answers to
24 the Chief Justice, you have two arguments,
25 alternative arguments. Are you distinguishing

1 your broader all airline workers from your
2 narrower argument, or am I misreading how you
3 constructed your -- your argument?

4 MS. BENNETT: I think even if the --
5 on the broader argument, what we mean by
6 "airline employees" is a category analogous to
7 "railroad employees."

8 JUSTICE KAVANAUGH: Right. So, on
9 your narrower argument, maybe you can tell me
10 what your narrower argument exactly is as you
11 would articulate it.

12 MS. BENNETT: Sure. So the narrower
13 argument is that cargo loaders were engaged in
14 foreign or interstate commerce in exactly the
15 same way as seamen and railroad employees. And
16 if we start with the phrase "engaged in
17 commerce," we know that in 1925 people who
18 loaded and unloaded railroad trains were engaged
19 in foreign and interstate --

20 JUSTICE KAVANAUGH: So on your --

21 MS. BENNETT: -- commerce.

22 JUSTICE KAVANAUGH: Sorry to
23 interrupt.

24 MS. BENNETT: Sure.

25 JUSTICE KAVANAUGH: But, on your

1 narrower argument, just to follow up on the
2 Chief Justice's questions, on your narrower
3 argument, does that bring in then the gate
4 ticket agents, or is that a question for another
5 day, or where does that stand?

6 MS. BENNETT: On the narrower
7 argument, I think that's a much more difficult
8 question. And the question would be -- you
9 know, the -- the narrower argument would be, are
10 those people engaged in foreign or interstate
11 commerce? If we take the -- if we take the
12 class of workers as the job you're doing, then
13 we would look at the flow -- I think we would
14 look at the flow of commerce, and -- and for
15 passengers, that really started when they --
16 they got to the airport and ended when they got
17 to their destination.

18 So likely even on the narrower
19 argument, I would say that ticket agents, people
20 who take your ticket when you get to the
21 airport, are probably included.

22 JUSTICE KAVANAUGH: But we could leave
23 that open?

24 MS. BENNETT: But -- absolutely. You
25 could leave it open. That's a much more

1 difficult question than cargo loaders. And we
2 know that cargo loaders are engaged in commerce
3 in 1925 because this Court said so.

4 JUSTICE GORSUCH: Can I ask you,
5 though --

6 MS. BENNETT: Sure.

7 JUSTICE GORSUCH: -- you said arrive
8 at their final destination. You've said that a
9 couple of times now. And that brings to my
10 mind -- and we have a lot of amici here from,
11 like, Lyft and Uber, and -- and Justice Breyer
12 referred to them. I can understand in 1925 that
13 someone who loaded and unloaded a ship might
14 have been involved in -- engaged in commerce. I
15 understand that, the narrower version of that
16 argument. I can get my head around that.

17 I'm not sure I can get my head
18 around -- and maybe you can explain to me
19 whether you think that necessarily includes the
20 last mile from the -- from the dock, from --
21 from the railyard to -- to the consumer. Can
22 you help me there?

23 MS. BENNETT: Sure. So -- so, in
24 terms of Lyft and Uber specifically, you know,
25 what this Court said in, for example, United

1 States v. Yellow Cab and what it says in Knight
2 as well is that the customary understanding of
3 transportation by railroad, by boat, by plane is
4 that it ends -- by final destination for
5 passengers, it ends at the station, your final
6 station, and that the -- the local sort of taxi
7 service afterwards was typically not understood
8 as included in that transportation.

9 And so it's different than, for
10 example -- you know, there -- there were
11 last-mile drivers of goods. There were
12 last-mile railroad workers who took goods on the
13 railroad for the last mile of a journey. And
14 this Court had a case called Hancock, for
15 example, that deals with last- and first-mile
16 railroad workers. And in that case, where the
17 -- the last mile is part of a continuous
18 journey, what this Court held is -- is that that
19 last mile, even though it's entirely intrastate,
20 is still part of the continuous journey.

21 So, for workers like Lyft and Uber and
22 other kinds of sort of last-mile drivers, what
23 the question would be is, is it part of this
24 continuous journey in the same way that the
25 railroad worker in Hancock was, or, instead, is

1 it really a separate sort of local kind of
2 transportation?

3 And that's how I would address that --

4 JUSTICE GORSUCH: Okay.

5 MS. BENNETT: -- that question.

6 JUSTICE GORSUCH: And then seamen,
7 help -- help us out with that.

8 MS. BENNETT: Sure.

9 JUSTICE GORSUCH: That is, the -- the
10 -- your friend on the other side's strongest
11 argument, that seamen were people who rode the
12 waves and did not include stevedores, and we
13 need to take cognizance of that fact.

14 MS. BENNETT: So -- so two -- two
15 things on that.

16 First is the ejusdem generis analysis
17 is telling us we're looking for a commonality.
18 So we're looking for what is the same between
19 seamen and railroad employees. And -- and at
20 the very least, we know that railroad employees
21 were not necessarily people aboard a vessel.
22 Take the signalman, for example. The cargo
23 loader in Burch. In Rhodes, the station agent.
24 And so that can't be a commonality between
25 seamen and railroad employees.

1 And even on the -- even if -- on the
2 stevedores argument itself, a few things.
3 First, Ms. Saxon is not a stevedore. You know,
4 Mr. Dvoretzky said, if you were a seamen who
5 loaded and unloaded, if you're a railroad
6 employee who loaded/unloaded, then you would be
7 exempt. Here, she's an airline employee who
8 loads and unloads.

9 And so regardless of what happens with
10 the separate category of stevedores, certainly,
11 airline employees who load and unload are no
12 different than seamen or railroad employees --

13 JUSTICE GORSUCH: You -- you accept
14 the premise, though, that -- that stevedores
15 were separate from seamen in 1925?

16 MS. BENNETT: Not always, Your Honor,
17 and we have two pieces of evidence that they
18 weren't. So the first is this Court, the year
19 after the FAA was passed, interpreted the word
20 "seamen" in the Jones Act, and what it said is
21 that includes stevedores. And so we know that
22 at least in some contexts seamen did include
23 stevedores where it didn't make sense to make a
24 distinction.

25 And we know particularly in this

1 context, if you look at the hearings on the FAA,
2 there are very few mentions of this exemption in
3 the hearings. But one of them is the reason you
4 would include this exemption is to ensure that
5 stevedores in particular are not subject to the
6 FAA.

7 So it seems quite likely that when
8 Congress used the word "seamen," it was using it
9 in the same way that this Court understood it to
10 be used in the Jones Act at the time, which is
11 to exclude stevedores.

12 JUSTICE ALITO: But whether or not
13 stevedores were considered to be seamen, would
14 you say that everybody who works for a shipping
15 company, a -- an ocean liner company, falls
16 within the exemption?

17 MS. BENNETT: Not everybody, but,
18 certainly, those who do the customary work of
19 the company. So the -- the commonality between
20 seamen and railroad employees is they're both
21 classes of workers. You know, seamen do the
22 customary work of the shipping industry. That's
23 why they're identified. That's the way in which
24 they're engaged in commerce.

25 JUSTICE ALITO: Well, no, a lot of

1 people do the customary work of a -- of a --
2 what's the word I'm looking for -- a maritime
3 company, a company that operates ships, besides
4 seamen. So what was the point of putting in
5 seamen if everybody was going to be included?

6 MS. BENNETT: So what seamen and
7 railroad employees both are were commonly
8 understood categories -- pre-existing categories
9 of workers. And -- and so Congress identified
10 those categories of workers because they existed
11 in the world.

12 The other -- the other reason is that
13 seamen and railroad employees both already had
14 dispute resolute statutes governing them, and so
15 Congress would have been specifically thinking
16 about them at the time.

17 But -- but we know that Congress
18 didn't mean to limit the exemption to people who
19 were seamen or people who were railroad
20 employees because it also exempted any other
21 class of workers engaged in commerce.

22 JUSTICE ALITO: Who -- besides
23 executives who works for an airline do you think
24 does not fall within this exemption, or is there
25 no such -- is everybody other than the

1 executives included?

2 MS. BENNETT: No. So say Southwest,
3 for example, had a credit card points program.
4 I think they maybe do. The people who work for
5 the credit cards point program are not doing the
6 transportation work of Southwest. They're doing
7 something that is, at best, tenuously connected
8 to that, and so they would not fall within the
9 scope of the exemption.

10 JUSTICE ALITO: What about a
11 bookkeeper, somebody who schedules crews?

12 MS. BENNETT: I think somebody who
13 schedules crews is -- would fall within the
14 exemption, and -- and the reason for that is --
15 is because, you know, that person would have
16 been a railroad employee in 1925. They would
17 have been doing the customary work of the
18 railroad.

19 And so, under the test for what counts
20 as a railroad employee that's been in place for
21 a hundred years and is now also employed to --
22 applied to airline employees, that person would
23 also be exempt.

24 JUSTICE KAGAN: How about the people
25 who design or manage the website for Southwest?

1 MS. BENNETT: I think that's a more
2 difficult question, and -- and I will tell you
3 that this question actually does come up
4 occasionally under the Railway Labor Act today.

5 You know, I am aware of one decision
6 at least that says that that's really integral
7 to the transportation of passengers. And so
8 it's possible that that person is an airline
9 employee. If they are, it's really the outer
10 edge of what's in this exemption.

11 Cargo loaders, on the other hand, are
12 the core of what's at this exemption. And --
13 and not only are they -- do we know that they
14 were railroad employees at the time, we also
15 know that they were engaged in commerce at the
16 time.

17 So we not only have -- you know, Mr.
18 Dvoretzky pointed out that Burch is a FELA case.
19 But I want to know that Burch does not
20 articulate new principles in the context of
21 FELA. Burch is relying on, you know, dozens of
22 cases of this Court that all held that
23 transportation has already begun once it's in
24 the hands of the carrier and it doesn't end
25 until it's delivered.

1 It's also relying on cases of this
2 Court that hold that loading and unloading
3 specifically count, so you have Gloucester
4 Ferry, you have Hays, you have a number of these
5 cases in a number of different contexts, all of
6 which hold that loading and unloading
7 specifically are -- are -- people who do that
8 are engaged in commerce.

9 And what Southwest argues is that,
10 well, those cases aren't under this particular
11 statute. But, of course, they're not. This
12 particular statute didn't exist. But this Court
13 -- but Congress, knowing how this Court had
14 interpreted the phrase "engaged in interstate
15 commerce," "engaged in foreign commerce,"
16 nevertheless used those words.

17 And -- and I want to -- I want to note
18 that, you know, Southwest presents the virtue of
19 its test as a bright-line rule. That's
20 essentially Southwest's argument, is that their
21 test is this bright-line rule that will be
22 easily administered.

23 And I think it's worth noting that, in
24 fact, in many cases, that's not true. And it's
25 not just a problem in these novel industries

1 like Lyft or Uber, which I will say I don't know
2 how Southwest's test would apply there because
3 would it be a percentage of the rides, for
4 example? Would it be a percentage of the
5 people? Would the class of workers be Lyft
6 drivers? Would it be Uber drivers?

7 But even in heartland classes of
8 workers, heartland categories of workers on the
9 railroad and the airline, it is difficult to
10 know how to apply Southwest's test.

11 So, if you take, for example,
12 loadmasters, that's a really key airline
13 function for freight airlines. And what they do
14 is they balance the load of the air -- of the
15 airplane so it doesn't fall out of the sky. And
16 sometimes they're at airports and sometimes they
17 ride on the plane.

18 And sometimes the same person does
19 both. Sometimes those are different people.
20 It's not clear to me on Southwest's test what
21 the category of workers would be. Would it be
22 all loadmasters? Would it be loadmasters on a
23 plane? Would it be Southwest loadmasters?

24 It's not clear to me how you would
25 know on their test whether or not as a class

1 those people are on a vessel engaged in crossing
2 state lines, rather, would it be a percentage, a
3 percentage of each person?

4 And -- and that's true for a number of
5 categories. I haven't just cherry-picked, you
6 know, one particular group of workers that is
7 difficult -- that's particularly difficult.

8 Particularly on the railroad at the
9 time, there were a number of workers who were on
10 and off the train, you know, flagmen, for
11 example, people warning of danger. Some worked
12 on the train. Some didn't. Baggage handlers,
13 some worked on the train and some didn't. And
14 so there are a number of categories of workers
15 that actually would be quite difficult under
16 Southwest's test, and I -- and I recognize that
17 --

18 JUSTICE ALITO: Could you say
19 succinctly what your test is?

20 MS. BENNETT: Sure.

21 JUSTICE ALITO: What test you would
22 recommend that we adopt?

23 MS. BENNETT: Sure. Airline
24 employees, it's the same test that has been in
25 effect in the railroad industry for over a

1 hundred years. Airline employees are those who
2 do the work of the airline. They do the
3 customary work directly contributory to the
4 airline's transportation function.

5 JUSTICE KAGAN: And what's the
6 narrower test if we decide to go that route?

7 MS. BENNETT: Sure. So the narrower
8 test would simply be a -- a class of workers
9 that is engaged -- would be understood to be
10 engaged in foreign or interstate commerce, which
11 at the very least would be people who handle
12 goods while they're in commerce.

13 So anybody who handles goods while
14 they're in transportation from the -- the start
15 of the transportation, when they're given to the
16 carrier, to the end.

17 JUSTICE ALITO: So any -- would --
18 would -- would your test apply to any company
19 that engages in the -- the shipment or
20 transportation of people or goods across state
21 lines?

22 MS. BENNETT: I -- I --

23 JUSTICE ALITO: What -- to what
24 industries would it apply besides the airlines?

25 MS. BENNETT: So it would certainly

1 apply, you know, I can think of two, I think,
2 major industries that -- that -- that are the
3 same, trucking and -- and bussing. And I -- I'm
4 not sure -- I can't think of any other
5 industries. Perhaps space travel will take off
6 and it would apply to that industry. But it
7 really is, you know, still a narrow test.

8 JUSTICE ALITO: What about a company
9 that ships most of its products across state
10 lines to consumers, let's say?

11 MS. BENNETT: Would it work to --
12 would it apply to the --

13 JUSTICE ALITO: Yeah.

14 MS. BENNETT: So -- so what I would do
15 to answer that question is to look at whether
16 those people would have been engaged in commerce
17 in the same way as railroad employees and seamen
18 at the time.

19 And -- and if you look, in 1925, you
20 know, railroad employees and seamen were really
21 people who worked in industries that shipped
22 goods for the public. So, if we're talking
23 about a company that is shipping its own goods,
24 those people likely wouldn't have been railroad
25 employees or seamen at the time. And,

1 similarly, those people likely won't -- wouldn't
2 be exempt from the statute here.

3 And so -- and so, really, this is
4 still quite a narrow category. You know,
5 transportation workers is a narrow class --
6 category of workers, and workers themselves is a
7 narrow category of the transactions to which the
8 FAA applies.

9 CHIEF JUSTICE ROBERTS: What about --
10 what about workers for a company like Amazon or
11 something who are obviously shipping goods
12 across state lines? It doesn't sound like a
13 narrow group to me.

14 MS. BENNETT: Well, so I -- I -- you
15 know, I think the way I would look at that is to
16 -- is to look at what they're doing and to see,
17 again, whether that is similar to what seamen
18 and railroad employees did in 1925.

19 CHIEF JUSTICE ROBERTS: Well, they're
20 picking the products and put them in a box and
21 then ship them somewhere. That's what they're
22 doing.

23 MS. BENNETT: Sure. So -- so,
24 certainly, you know, retail warehouse workers in
25 1925 would not have been seamen or railroad

1 employees. The only warehouse workers that
2 would have been seamen and railroad employees
3 were people who worked for the transportation
4 company itself who were handling the goods in
5 the warehouse while it was on its journey.

6 So -- so, to -- to the extent that --

7 CHIEF JUSTICE ROBERTS: Well, I mean,
8 I meant to hypothesize people who were handling
9 goods in the warehouse and getting them into
10 interstate transportation. They would not be
11 covered or --

12 MS. BENNETT: So -- so the -- I think
13 it would depend on whether they were, you know,
14 retail warehouse workers, which -- which
15 certainly wouldn't have been covered -- wouldn't
16 have been railroad employees or seamen who are
17 engaged in that way, or -- or whether they are,
18 you know, workers akin to the railroad workers
19 at the freight warehouse.

20 And -- and --

21 CHIEF JUSTICE ROBERTS: So UPS and
22 FedEx and all those things would be covered?

23 MS. BENNETT: That's right. And those
24 people would have been railroad employees in
25 1925. There are at least six decisions of the

1 Railroad Labor Board holding that those people
2 do the customary work of the railroad.

3 It was integral to railroad
4 transportation, just as it is -- is to trucking
5 and plane transportation today, that there is a
6 place for the -- the packages and the shipments
7 to be dropped off and to -- to be stored before
8 they go on their journey.

9 It's integral -- you know, it's a
10 place where they -- they rest in between
11 different legs of their journey. Justice Thomas
12 mentioned intermodal transportation. The
13 freight warehouse was integral to that too.

14 And so, certainly, to the extent that
15 we're talking about, you know, a warehouse that
16 is in the middle of -- of the goods journey,
17 those people would have been railroad employees.

18 JUSTICE BREYER: How -- how do you
19 distinguish -- trucking is in, you say, trucking
20 is in the exemption.

21 MS. BENNETT: Yes, Your Honor.

22 JUSTICE BREYER: Okay. A company does
23 just like the trucking, but they have other
24 parts, and they do their own shipping. That's
25 Amazon. So how -- how -- where -- where --

1 where -- how does that work?

2 MS. BENNETT: So the way I would
3 address that --

4 JUSTICE BREYER: And not just Amazon.
5 I mean department stores, dozens.

6 MS. BENNETT: Sure. So -- so I think
7 those people are likely not exempt, and -- and
8 here's why. There was a -- this question came
9 up in 1925, and it usually came up in the form
10 of is this railroad actually a railroad
11 regulated under the Interstate Commerce Act or
12 the Transportation Act, and there was a
13 distinction that was made between railroads that
14 shipped things for the public, and I think
15 that's how we normally understood -- understand
16 seamen and railroad employees, and say a coal's
17 internal -- a coal company's internal railroads.

18 Coal companies had a lot of railroads
19 and they would take your coal from the place
20 where you mined it to the place where you
21 refined it. And -- and those were not really
22 understood to be railroads in -- in quite the
23 same way, and I don't think those employees
24 would have understood to be railroad employees.

25 And so what we would look at in a

1 company like that is to see, you know, what are
2 those workers doing? Are they really doing the
3 work that is like seamen and railroad employees
4 of -- of shipping goods for the public, or are
5 they really doing their own company's internal
6 work? And that's how I would analyze that
7 question.

8 JUSTICE ALITO: I mean, your argument
9 seems to be -- to shift back and forth. If we
10 look at employees who are engaged in interstate
11 and foreign commerce as we understand those
12 terms today, wow, that includes just about every
13 commercial activity.

14 On the other hand, if we look at
15 seamen, that's pretty narrow, and it may or may
16 not include stevedores. Let's say, you know,
17 you throw in stevedores.

18 I don't see how it includes the person
19 in the office who sells the ticket to take the
20 Queen Mary across the Atlantic, unless -- so
21 unless that's surplusage, working in interstate
22 and foreign commerce has to have a narrower
23 meaning.

24 MS. BENNETT: I don't think that's
25 right, Your Honor, for two reasons.

1 First, it's not surplusage because, as
2 Circuit City tells us, you know, what seamen and
3 railroad employees are doing is saying the way
4 in which you're engaged in commerce is the
5 transportation branch.

6 And so -- and so that serves a
7 function. If it just said, for example --

8 JUSTICE ALITO: If everybody who
9 worked for the Cunard line was covered, what
10 would be the point of -- or that's not a --
11 that's a passenger shipping line.

12 Some commercial shipping line,
13 everybody who worked for that was covered, what
14 would be the point of specifying that seamen are
15 covered?

16 MS. BENNETT: You -- well, a couple
17 reasons. One, if you only had one category, it
18 would be actually very difficult to tell what
19 the commonality was.

20 If it just said railroad employees and
21 any other class of workers, that would make it
22 much more difficult to understand, you know, how
23 that category reflected the cat -- the other
24 classes of workers we're identifying.

25 And this Court has repeatedly said

1 that we don't apply ejusdem generis if you only
2 have one category.

3 JUSTICE ALITO: Suppose it said
4 seamen, railroad engineers, and others engaged
5 in interstate or foreign commerce. Would
6 everybody who worked for the railroad be
7 covered?

8 MS. BENNETT: No, and the -- I -- I --
9 or potentially not. That would be a much more
10 difficult question, and the reason is that would
11 be -- that could be indicating to us that we're
12 going job by job.

13 Here, instead, we have seamen and
14 railroad employees, the two classes of workers
15 that had preexisting dispute resolution statutes
16 at the time and were -- were commonly understood
17 categories.

18 And so -- and so the way in which
19 they're engaged in commerce and the way in which
20 they're similar is that they're -- as a class,
21 the seamen are the people who do the work of the
22 shipping industry. As a class, railroad
23 employees are the people who do the work of the
24 railroad industry.

25 And so if you had railroad engineers,

1 that would shed some doubt on that linkage. And
2 it might suggest that, in fact, potentially
3 we're looking for a more job-specific approach.

4 Here, it doesn't say seamen, you know,
5 flagmen, railroad conductors. It says seamen
6 and railroad employees. And so we're talking
7 about the classes of workers that are specific
8 to the industry.

9 JUSTICE KAGAN: So would -- would --
10 assume two things for me.

11 MS. BENNETT: Sure.

12 JUSTICE KAGAN: Assume that the term
13 "railroad employees" does include baggage
14 handlers --

15 MS. BENNETT: Um-hum.

16 JUSTICE KAGAN: -- so you win that
17 one. But assume "seamen" does not include
18 stevedores, so Mr. Dvoretzky wins that one. And
19 I think he said, when this came up, well, then,
20 it's one on each side. It doesn't tell you very
21 much of anything.

22 How would -- if -- if you make those
23 two assumptions, how should we approach ramp
24 supervisors?

25 MS. BENNETT: So if you make those two

1 assumptions, then what we know is that the
2 commonality between seamen and railroad
3 employees cannot be loading and unloading.
4 That's all that tells us, is seamen excludes
5 stevedores.

6 And -- and what we do know that the
7 commonality is, is that they both do the work of
8 the industry. And so if you look at cargo
9 loaders, they do exactly the same thing.

10 And -- and what the statute itself
11 tells us is that the commonality we're looking
12 for is the commerce-related commonality. So at
13 the very least, when we're talking about a group
14 of workers who this Court had repeatedly said
15 are themselves engaged in commerce, then -- then
16 it would -- and not only that this Court has
17 said they're engaged in commerce, that they're
18 engaged in commerce just in the same way that
19 seamen are, then we know that, at the very
20 least, these people are in the residual clause
21 even if they're not seamen or railroad
22 employees, if what we're looking for is a class
23 of workers engaged in commerce like seamen, like
24 railroad employees, well, this Court has already
25 answered that question in Puget Sound, where it

1 said that stevedores are engaged in interstate
2 commerce just like the crew of a ship.

3 JUSTICE GORSUCH: I have a historical
4 question --

5 MS. BENNETT: Sure.

6 JUSTICE GORSUCH: -- you probably know
7 the answer to. In -- in 1925, there were
8 alternative dispute resolutions mechanisms that
9 Congress had approved for seamen and railroad
10 workers.

11 Did the railroad workers one cover
12 anyone who worked for the railroad, or was it
13 more limited and, if so, how?

14 MS. BENNETT: It was limited by, in
15 exactly the way, exactly the test we're
16 proposing apply here. In Railroad Labor Board
17 Decision 1982, which was cited in New Prime,
18 what the Railroad Labor Board said is, by
19 "railroad employees," what the -- what Congress
20 must have meant is people who do the customary
21 work directly contributory to the operation of
22 the railroad.

23 JUSTICE GORSUCH: Right.

24 MS. BENNETT: And -- and we know what
25 that means because we have the Railroad Labor

1 Board's orders saying who was in and who wasn't
2 in that -- subsequent to that decision.

3 JUSTICE GORSUCH: The general counsel
4 wasn't in it.

5 MS. BENNETT: The general counsel
6 would not have been. I'm not aware of any order
7 even discussing that because it was well
8 understood that executives would not have been
9 in it. But we do know that cargo loaders are in
10 it. There are six decisions after that decision
11 saying cargo loaders.

12 We know that, you know, people on the
13 train were in it. We know that people in the
14 yard were -- were in, and we know that people in
15 the station were in. On the other -- who at
16 least -- who worked -- did the transportation
17 work of the -- of the railroad. Yes, Your
18 Honor.

19 JUSTICE KAVANAUGH: Justice Kagan's
20 question raises, I guess, an oddity in the
21 statute here, which I think there are going to
22 be oddities no matter what, but -- which is if
23 "seamen" doesn't include stevedores but
24 "railroad workers" does include the people who
25 load and unload, that stevedores nonetheless in

1 your view come in through the residual clause;
2 is that accurate?

3 MS. BENNETT: That's accurate. And we
4 know that Congress didn't mean to limit the
5 exemption to people who actually were seamen or
6 actually were railroad employees, because that's
7 why they included the residual clause.

8 JUSTICE KAVANAUGH: That -- that's
9 correct, although it is a little odd to have the
10 seamen as a category and then say actually that
11 doesn't include everyone who's going to be
12 covered within the shipping context, I guess.

13 MS. BENNETT: Potentially, but, again,
14 seamen and railroad employees were the people
15 who had dispute resolutions statutes at the
16 time. Stevedores did not.

17 And I'll note that stevedores -- you
18 know, many stevedores were railroad employees.
19 Again, if you look at the wage orders of the
20 Railroad Labor Board, you'll see stevedores
21 listed there.

22 So another potential reason that
23 stevedores aren't listed is because they're, you
24 know, a cross-cutting class of workers, and so
25 that would actually make it difficult to

1 specifically list them. It would be a bit
2 confusing to have listed them.

3 And so for that reason too, it makes
4 perfect sense that Congress, you know,
5 specifically identified the classes that
6 themselves had dispute resolution schemes and
7 left everybody else to the residual clause.

8 And -- and I just -- to wrap up, I
9 just, you know, to -- want to note that
10 Southwest has offered no evidence at all, from
11 any time period, either about what the phrase
12 "engaged in interstate commerce" means or the
13 phrase "seamen or railroad employees" means to
14 show these people who are at these -- rather,
15 these words are limited to people who are aboard
16 a vessel crossing state lines.

17 Thank you.

18 CHIEF JUSTICE ROBERTS: Thank you,
19 counsel.

20 Justice Thomas, any questions?

21 JUSTICE THOMAS: No questions, Mr.
22 Chief Justice.

23 CHIEF JUSTICE ROBERTS: Justice
24 Breyer?

25 Justice Alito?

1 Justice Gorsuch? Anything?

2 Justice Kavanaugh?

3 Thank you, counsel.

4 MS. BENNETT: Thank you.

5 CHIEF JUSTICE ROBERTS: Mr. Dvoretzky,
6 rebuttal?

7 REBUTTAL ARGUMENT OF SHAY DVORETZKY

8 ON BEHALF OF THE PETITIONER

9 MR. DVORETZKY: Thank you, Mr. Chief
10 Justice. A few points in rebuttal.

11 First of all, Ms. Bennett and I agree,
12 of course, that "engaged in foreign or
13 interstate commerce" has to mean engaged in the
14 same way as seamen and railroad employees.

15 With respect to seamen, seamen as a
16 class are not those who did the work of the
17 maritime industry. They did a particular
18 function within the maritime industry, but it's
19 incorrect to -- to say that the commonality that
20 can be extrapolated to the residual clause is
21 simply doing the work of the industry.

22 With respect to railroad employees, I
23 want to give a few specific examples of how
24 railroad employees were understood at the time
25 more -- more narrowly than what Ms. Bennett is

1 suggesting.

2 Justice Gorsuch, you asked about the
3 Transportation Act. Under the Transportation
4 Act, it wasn't all railroad employees. There's
5 a decision from 1922 of the Railway Labor Board
6 in which train dispatchers were excluded from
7 the scope of the Transportation Act because they
8 had a supervisory role, much like by analogy
9 ramp agent supervisors have a supervisory role.

10 So even the Transportation Act did not
11 extend all the way to include everybody who in
12 some way contributed to the work of the
13 railroad.

14 The Hours of Service Act from 1907
15 applied by its terms to persons actually engaged
16 in or in connection with the movement of any
17 train. That's consistent with our test having
18 to do with being on the -- the plane or the --
19 or the ship or the train.

20 The Erdman Act, and the Newlands Act
21 likewise, that was from 19 -- from 1898,
22 referred to people who served on railcars. And
23 so railroad employees, alongside seamen, ought
24 to be understood narrowly in the way that --
25 that we're suggesting.

1 With respect to administrability, our
2 test is clear. Does the class of workers
3 predominantly work on the plane or the train?
4 The way that would translate to the airline
5 industry is that -- as a distinction between
6 flight crew and ground crew. Flight crew are
7 analogous to seamen. Ground crew are not.

8 That approach is consistent with
9 Circuit City. It's a -- it's a clear rule that
10 will avoid extensive litigation over the scope
11 of the Section 1 exemption. It's also
12 consistent with purpose. You know, Ms. Bennett
13 suggested that the entire trucking industry
14 would be exempt. Of course, there is no federal
15 arbitration regime for the entire trucking --
16 for the -- for the entire trucking industry.

17 And so the Section 1 exemption ought
18 not be construed in a way that creates a gaping
19 hole, undermining Congress's purposes in
20 Section 2.

21 The -- the right approach for this
22 Court to follow here, I think, is the one that
23 then Judge Barrett adopted in Grubhub. Her test
24 is that transportation workers are those who are
25 actually engaged in the movement of goods in

1 interstate commerce.

2 It's not enough simply to have a
3 connection to the movement -- connection to the
4 movement of the goods. It's not a goods-focused
5 inquiry under the statute. The statute under
6 the inquiry -- the inquiry under the statute has
7 to do with actually moving the goods.

8 And, again, from -- from Justice
9 Barrett's opinion, the class of workers must
10 themselves be engaged in the channels of foreign
11 or interstate commerce and in the way that
12 seamen, in particular, were and that railroad
13 employees properly understood in this context
14 were.

15 CHIEF JUSTICE ROBERTS: Thank you,
16 counsel.

17 The case is submitted.

18 (Whereupon, at 12:51 p.m., the case
19 was submitted.)
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21
22
23
24
25

Official - Subject to Final Review

<p>1</p> <p>1 [35] 3:11 4:14 8:6 9:10 11:18,18 12:20 13:13,23 15:7 16:14 19:17, 20 20:14 21:20 22:2,7,13 26:14, 18 27:4,7,8,13 33:18,20 34:18,20 35:7,20 36:1,6 38:13 73:11,17</p> <p>1's [1] 3:17</p> <p>11:43 [2] 1:15 3:2</p> <p>12:51 [1] 74:18</p> <p>1898 [1] 72:21</p> <p>19 [1] 72:21</p> <p>1907 [1] 72:14</p> <p>1922 [1] 72:5</p> <p>1924 [3] 18:7 21:8,12</p> <p>1925 [16] 14:3 26:21 39:11 41:5,11 43:17 45:3,12 48:15 51:16 57:19 58:18,25 59:25 61:9 67:7</p> <p>1982 [1] 67:17</p>	<p>adopted [2] 19:14 73:23</p> <p>adverb [1] 16:17</p> <p>afterwards [1] 46:7</p> <p>agency [1] 41:14</p> <p>agent [7] 6:15 8:8 36:11,13,15 47: 23 72:9</p> <p>agents [5] 35:5 41:2,5 44:4,19</p> <p>agree [2] 12:3 71:11</p> <p>agreement [1] 22:19</p> <p>agreements [3] 21:21 33:12,13</p> <p>air [2] 25:25 54:14</p> <p>airline [23] 4:14 25:19,21,22,23,25 28:23 39:9 41:6,22 43:1,6 48:7,11 50:23 51:22 52:8 54:9,12 55:23 56:1,2 73:4</p> <p>airline's [1] 56:4</p> <p>AIRLINES [4] 1:3 3:4 54:13 56:24</p> <p>airplane [1] 54:15</p> <p>airplanes [1] 40:4</p> <p>airport [4] 34:3 41:22 44:16,21</p> <p>airports [1] 54:16</p> <p>akin [1] 59:18</p> <p>Alito [15] 35:14 49:12,25 50:22 51: 10 55:18,21 56:17,23 57:8,13 62: 8 63:8 64:3 70:25</p> <p>alluded [1] 33:7</p> <p>alongside [3] 15:12 17:11 72:23</p> <p>already [3] 50:13 52:23 66:24</p> <p>alternative [2] 42:25 67:8</p> <p>although [1] 69:9</p> <p>Amazon [3] 58:10 60:25 61:4</p> <p>American [1] 14:11</p> <p>amici [1] 45:10</p> <p>among [1] 4:19</p> <p>amount [1] 30:19</p> <p>analogous [6] 3:22 6:1 8:10 35:4 43:6 73:7</p> <p>analogy [1] 72:8</p> <p>analysis [1] 47:16</p> <p>analyze [1] 62:6</p> <p>ancillary [1] 39:18</p> <p>another [4] 8:7 19:4 44:4 69:22</p> <p>answer [4] 33:15,17 57:15 67:7</p> <p>answered [1] 66:25</p> <p>answering [4] 11:7,13 37:19 38:9</p> <p>answers [1] 42:23</p> <p>anti-arbitration [1] 27:16</p> <p>anybody [2] 42:3 56:13</p> <p>APPEARANCES [1] 1:17</p> <p>applied [2] 51:22 72:15</p> <p>applies [1] 58:8</p> <p>apply [11] 11:3 28:1 54:2,10 56:18, 24 57:1,6,12 64:1 67:16</p> <p>applying [1] 18:5</p> <p>approach [6] 19:7 41:3 65:3,23 73: 8,21</p> <p>appropriate [1] 16:18</p> <p>approved [1] 67:9</p> <p>arbitration [5] 8:20 9:4 27:12 40: 14 73:15</p> <p>area [1] 21:24</p> <p>aren't [2] 53:10 69:23</p> <p>argues [1] 53:9</p> <p>argument [29] 1:14 2:2,5,8 3:4,7 8:</p>	<p>14 28:22 29:16 33:9 38:18 40:19 43:2,3,5,9,10,13 44:1,3,7,9,19 45: 16 47:11 48:2 53:20 62:8 71:7</p> <p>arguments [2] 42:24,25</p> <p>around [3] 27:3 45:16,18</p> <p>arrive [1] 45:7</p> <p>art [3] 4:1 11:11 37:22</p> <p>articulate [2] 43:11 52:20</p> <p>aside [1] 13:3</p> <p>associated [1] 23:20</p> <p>assume [5] 26:4 41:5 65:10,12,17</p> <p>assumptions [2] 65:23 66:1</p> <p>atextual [2] 10:17 19:8</p> <p>Atlanta [3] 31:16,25 33:5</p> <p>Atlantic [1] 62:20</p> <p>attach [1] 16:17</p> <p>attributed [2] 27:14 28:13</p> <p>authority [1] 11:16</p> <p>avoid [2] 40:22 73:10</p> <p>aware [2] 52:5 68:6</p> <p>away [2] 33:25 34:5</p>	<p>25 7:3,10,14 24:8</p> <p>borders [11] 3:15 5:23 7:17 8:2,5 30:6,7 31:10,13 32:4,22</p> <p>both [6] 25:4 49:20 50:7,13 54:19 66:7</p> <p>box [1] 58:20</p> <p>branch [1] 63:5</p> <p>Bress [1] 7:23</p> <p>Breyer [6] 35:13 45:11 60:18,22 61:4 70:24</p> <p>brief [1] 5:8</p> <p>bright-line [2] 53:19,21</p> <p>bring [2] 12:5 44:3</p> <p>brings [1] 45:9</p> <p>broad [3] 10:18 16:1 21:14</p> <p>broaden [5] 27:9 28:9 32:17 43:1,5</p> <p>Burch [7] 10:13 17:23 37:5 47:23 52:18,19,21</p> <p>business [1] 20:11</p> <p>bussing [1] 57:3</p>
<p>2</p> <p>2 [4] 27:18 34:5 41:13 73:20</p> <p>2022 [1] 1:11</p> <p>21-309 [1] 3:4</p> <p>28 [1] 1:11</p>	<p>Alito [15] 35:14 49:12,25 50:22 51: 10 55:18,21 56:17,23 57:8,13 62: 8 63:8 64:3 70:25</p> <p>alluded [1] 33:7</p> <p>alongside [3] 15:12 17:11 72:23</p> <p>already [3] 50:13 52:23 66:24</p> <p>alternative [2] 42:25 67:8</p> <p>although [1] 69:9</p> <p>Amazon [3] 58:10 60:25 61:4</p> <p>American [1] 14:11</p> <p>amici [1] 45:10</p> <p>among [1] 4:19</p> <p>amount [1] 30:19</p> <p>analogous [6] 3:22 6:1 8:10 35:4 43:6 73:7</p> <p>analogy [1] 72:8</p> <p>analysis [1] 47:16</p> <p>analyze [1] 62:6</p> <p>ancillary [1] 39:18</p> <p>another [4] 8:7 19:4 44:4 69:22</p> <p>answer [4] 33:15,17 57:15 67:7</p> <p>answered [1] 66:25</p> <p>answering [4] 11:7,13 37:19 38:9</p> <p>answers [1] 42:23</p> <p>anti-arbitration [1] 27:16</p> <p>anybody [2] 42:3 56:13</p> <p>APPEARANCES [1] 1:17</p> <p>applied [2] 51:22 72:15</p> <p>applies [1] 58:8</p> <p>apply [11] 11:3 28:1 54:2,10 56:18, 24 57:1,6,12 64:1 67:16</p> <p>applying [1] 18:5</p> <p>approach [6] 19:7 41:3 65:3,23 73: 8,21</p> <p>appropriate [1] 16:18</p> <p>approved [1] 67:9</p> <p>arbitration [5] 8:20 9:4 27:12 40: 14 73:15</p> <p>area [1] 21:24</p> <p>aren't [2] 53:10 69:23</p> <p>argues [1] 53:9</p> <p>argument [29] 1:14 2:2,5,8 3:4,7 8:</p>	<p>B</p> <p>back [3] 31:16 33:7 62:9</p> <p>back-office [2] 14:15,21</p> <p>bag [1] 41:21</p> <p>baggage [6] 25:12,17,23 26:4 55: 12 65:13</p> <p>balance [1] 54:14</p> <p>Barrett [3] 3:21 5:17 73:23</p> <p>Barrett's [1] 74:9</p> <p>based [1] 16:22</p> <p>basic [1] 30:18</p> <p>basically [2] 32:7 33:13</p> <p>beginning [1] 29:15</p> <p>begins [1] 39:13</p> <p>begun [1] 52:23</p> <p>behalf [8] 1:19,22 2:4,7,10 3:8 38: 19 71:8</p> <p>belongs [1] 29:24</p> <p>BENNETT [58] 1:21 2:6 38:17,18, 20 41:4,10,23 42:8,11,14 43:4,12, 21,24 44:6,24 45:6,23 47:5,8,14 48:16 49:17 50:6 51:2,12 52:1 55: 20,23 56:7,22,25 57:11,14 58:14, 23 59:12,23 60:21 61:2,6 62:24 63:16 64:8 65:11,15,25 67:5,14, 24 68:5 69:3,13 71:4,11,25 73:12</p> <p>besides [3] 50:3,22 56:24</p> <p>best [1] 51:7</p> <p>better [1] 18:19</p> <p>between [13] 19:17 20:1 25:4 28:7 31:25 32:23 47:18,24 49:19 60:10 61:13 66:2 73:5</p> <p>bit [2] 29:8 70:1</p> <p>blackletter [1] 39:12</p> <p>Board [6] 41:14 60:1 67:16,18 69: 20 72:5</p> <p>Board's [1] 68:1</p> <p>boat [1] 46:3</p> <p>Boiler [1] 14:5</p> <p>book [1] 36:11</p> <p>bookkeeper [1] 51:11</p> <p>border [11] 4:19 5:10,15,25 6:7,22,</p>	<p>C</p> <p>Cab [1] 46:1</p> <p>California [1] 1:22</p> <p>call [2] 16:15,16</p> <p>called [1] 46:14</p> <p>came [6] 1:13 23:16 34:7 61:8,9 65:19</p> <p>cannot [1] 66:3</p> <p>capable [2] 4:4 30:21</p> <p>capacity [1] 20:18</p> <p>card [1] 51:3</p> <p>cards [1] 51:5</p> <p>cargo [26] 4:12,23,25 8:16 9:7,11, 15 10:22 11:3 12:5 13:5,9 16:8 21: 25 38:2,4 39:10,17 43:13 45:1,2 47:22 52:11 66:8 68:9,11</p> <p>Carr [1] 21:17</p> <p>carried [1] 35:1</p> <p>carrier [7] 13:6 18:3 19:24 20:12 39:14 52:24 56:16</p> <p>cars [1] 24:16</p> <p>Case [12] 3:4 10:8,13 16:6 17:23 18:24 31:1 46:14,16 52:18 74:17, 18</p> <p>cases [14] 9:20 11:6,23 19:12 30:2 37:6,18,25,25 52:22 53:1,5,10,24</p> <p>cat [1] 63:23</p> <p>categories [7] 50:8,8,10 54:8 55:5, 14 64:17</p> <p>category [10] 43:6 48:10 54:21 58: 4,6,7 63:17,23 64:2 69:10</p> <p>central [3] 5:20 6:2 8:3</p> <p>certainly [8] 41:11,17 48:10 49:18 56:25 58:24 59:15 60:14</p> <p>Chandris [6] 4:6 10:2,4,7 30:3,18</p> <p>channel [1] 5:19</p> <p>channels [2] 36:22 74:10</p> <p>characteristic [4] 3:25 8:3 10:5 30:4</p> <p>characterizing [1] 23:15</p> <p>cherry-picked [1] 55:5</p> <p>CHIEF [34] 3:3,9 5:7 6:4,10,19 7:6, 18 8:11 29:4,6,15 35:12 37:1 38:</p>
<p>3</p> <p>3 [1] 2:4</p> <p>300 [1] 34:5</p> <p>38 [1] 2:7</p>	<p>Alito [15] 35:14 49:12,25 50:22 51: 10 55:18,21 56:17,23 57:8,13 62: 8 63:8 64:3 70:25</p> <p>alluded [1] 33:7</p> <p>alongside [3] 15:12 17:11 72:23</p> <p>already [3] 50:13 52:23 66:24</p> <p>alternative [2] 42:25 67:8</p> <p>although [1] 69:9</p> <p>Amazon [3] 58:10 60:25 61:4</p> <p>American [1] 14:11</p> <p>amici [1] 45:10</p> <p>among [1] 4:19</p> <p>amount [1] 30:19</p> <p>analogous [6] 3:22 6:1 8:10 35:4 43:6 73:7</p> <p>analogy [1] 72:8</p> <p>analysis [1] 47:16</p> <p>analyze [1] 62:6</p> <p>ancillary [1] 39:18</p> <p>another [4] 8:7 19:4 44:4 69:22</p> <p>answer [4] 33:15,17 57:15 67:7</p> <p>answered [1] 66:25</p> <p>answering [4] 11:7,13 37:19 38:9</p> <p>answers [1] 42:23</p> <p>anti-arbitration [1] 27:16</p> <p>anybody [2] 42:3 56:13</p> <p>APPEARANCES [1] 1:17</p> <p>applied [2] 51:22 72:15</p> <p>applies [1] 58:8</p> <p>apply [11] 11:3 28:1 54:2,10 56:18, 24 57:1,6,12 64:1 67:16</p> <p>applying [1] 18:5</p> <p>approach [6] 19:7 41:3 65:3,23 73: 8,21</p> <p>appropriate [1] 16:18</p> <p>approved [1] 67:9</p> <p>arbitration [5] 8:20 9:4 27:12 40: 14 73:15</p> <p>area [1] 21:24</p> <p>aren't [2] 53:10 69:23</p> <p>argues [1] 53:9</p> <p>argument [29] 1:14 2:2,5,8 3:4,7 8:</p>	<p>B</p> <p>back [3] 31:16 33:7 62:9</p> <p>back-office [2] 14:15,21</p> <p>bag [1] 41:21</p> <p>baggage [6] 25:12,17,23 26:4 55: 12 65:13</p> <p>balance [1] 54:14</p> <p>Barrett [3] 3:21 5:17 73:23</p> <p>Barrett's [1] 74:9</p> <p>based [1] 16:22</p> <p>basic [1] 30:18</p> <p>basically [2] 32:7 33:13</p> <p>beginning [1] 29:15</p> <p>begins [1] 39:13</p> <p>begun [1] 52:23</p> <p>behalf [8] 1:19,22 2:4,7,10 3:8 38: 19 71:8</p> <p>belongs [1] 29:24</p> <p>BENNETT [58] 1:21 2:6 38:17,18, 20 41:4,10,23 42:8,11,14 43:4,12, 21,24 44:6,24 45:6,23 47:5,8,14 48:16 49:17 50:6 51:2,12 52:1 55: 20,23 56:7,22,25 57:11,14 58:14, 23 59:12,23 60:21 61:2,6 62:24 63:16 64:8 65:11,15,25 67:5,14, 24 68:5 69:3,13 71:4,11,25 73:12</p> <p>besides [3] 50:3,22 56:24</p> <p>best [1] 51:7</p> <p>better [1] 18:19</p> <p>between [13] 19:17 20:1 25:4 28:7 31:25 32:23 47:18,24 49:19 60:10 61:13 66:2 73:5</p> <p>bit [2] 29:8 70:1</p> <p>blackletter [1] 39:12</p> <p>Board [6] 41:14 60:1 67:16,18 69: 20 72:5</p> <p>Board's [1] 68:1</p> <p>boat [1] 46:3</p> <p>Boiler [1] 14:5</p> <p>book [1] 36:11</p> <p>bookkeeper [1] 51:11</p> <p>border [11] 4:19 5:10,15,25 6:7,22,</p>	

Official - Subject to Final Review

<p>15,20 41:1,7,18 42:6,9,12,24 44:2 58:9,19 59:7,21 70:18,22,23 71:5, 9 74:15</p> <p>choice ^[1] 28:6</p> <p>choose ^[1] 28:8</p> <p>Circuit ^[17] 3:16,17 5:3 7:24 11:10, 17,21 15:19 19:9 26:11 27:15 28: 13 36:5 37:22 40:22 63:2 73:9</p> <p>cited ^[1] 67:17</p> <p>cites ^[1] 37:6</p> <p>City ^[16] 3:16,18 5:4 11:11,17,21 15:19 19:9 26:12 27:15 28:13 36: 5 37:22 40:22 63:2 73:9</p> <p>clarify ^[2] 12:12 13:20</p> <p>Clark ^[1] 17:5</p> <p>class ^[53] 3:22 4:7 5:20,22 6:2,12, 14 7:17,25 8:8 14:13,20,24 15:16, 21 16:11 17:21 26:22 29:12,12,23, 25 30:4,11,25 31:5,20 32:1,1,6,8, 11,17,25 33:3 35:9 39:3 40:5 42: 20 44:12 50:21 54:5,25 56:8 58:5 63:21 64:20,22 66:22 69:24 71:16 73:2 74:9</p> <p>classes ^[12] 3:12,19 4:15,25 20:19 29:1 49:21 54:7 63:24 64:14 65:7 70:5</p> <p>Clause ^[10] 9:20 11:20 19:21 20:9 37:25 66:20 69:1,7 70:7 71:20</p> <p>clear ^[5] 39:5 54:20,24 73:2,9</p> <p>closely ^[4] 18:3,6 19:13 36:3</p> <p>clue ^[1] 22:3</p> <p>CO ^[1] 1:3</p> <p>coal ^[3] 61:17,18,19</p> <p>coal's ^[1] 61:16</p> <p>cognizance ^[1] 47:13</p> <p>colors ^[1] 15:19</p> <p>come ^[5] 13:5 23:2,3 52:3 69:1</p> <p>comes ^[3] 15:12 22:5 34:4</p> <p>commerce ^[97] 3:14 5:12,19 7:12, 13 9:14,17,20 10:21,23,25 11:2,6, 10,15,19,24 12:5 13:5 14:17 15:4, 18,25 16:9,10 17:22,25 18:17 19: 11,23,25 20:13 21:2,9,22 22:1,6, 10,17,20 23:9,13,14,19,22,24 24:5 26:11 28:12 33:19,22 36:23 37:10, 17,21,24 38:4,8,12,24 39:4,13,21 40:2,5,11 43:14,17,21 44:11,14 45:2,14 49:24 50:21 52:15 53:8, 15,15 56:10,12 57:16 61:11 62:11, 22 63:4 64:5,19 66:15,17,18,23 67:2 70:12 71:13 74:1,11</p> <p>commerce-related ^[1] 66:12</p> <p>commercial ^[2] 62:13 63:12</p> <p>common ^[5] 10:10,10 19:24 20:12 37:15</p> <p>commonality ^[9] 47:17,24 49:19 63:19 66:2,7,11,12 71:19</p> <p>commonly ^[2] 50:7 64:16</p> <p>companies ^[1] 61:18</p> <p>company ^[12] 49:15,15,19 50:3,3 56:18 57:8,23 58:10 59:4 60:22 62:1</p> <p>company's ^[2] 61:17 62:5</p> <p>compensation ^[1] 8:24</p>	<p>competing ^[2] 9:12 28:7</p> <p>computer ^[1] 36:13</p> <p>conceivably ^[1] 34:8</p> <p>conclusion ^[1] 18:7</p> <p>conditions ^[1] 30:18</p> <p>conductors ^[1] 65:5</p> <p>confusing ^[1] 70:2</p> <p>Congress ^[24] 4:11 7:10 9:1 14:7 15:14 16:21,24 22:7 24:3 25:18 26:20 27:10,14 32:22 38:22 49:8 50:9,15,17 53:13 67:9,19 69:4 70: 4</p> <p>Congress's ^[3] 8:19 11:14 73:19</p> <p>connected ^[3] 19:13 39:19 51:7</p> <p>connection ^[3] 72:16 74:3,3</p> <p>considered ^[7] 8:15,16 10:24 21: 25 30:12 34:11 49:13</p> <p>considers ^[1] 22:19</p> <p>consistent ^[3] 72:17 73:8,12</p> <p>consistently ^[1] 26:18</p> <p>constructed ^[1] 43:3</p> <p>construction ^[1] 26:13</p> <p>construe ^[1] 27:4</p> <p>construed ^[1] 73:18</p> <p>consumer ^[1] 45:21</p> <p>consumers ^[1] 57:10</p> <p>container ^[3] 34:2,3,4</p> <p>contemporaneous ^[1] 19:4</p> <p>contemporaries ^[1] 20:25</p> <p>contends ^[1] 40:3</p> <p>contention ^[1] 40:7</p> <p>context ^[9] 9:10 11:25 15:9 21:13 28:8 49:1 52:20 69:12 74:13</p> <p>contexts ^[2] 48:22 53:5</p> <p>continues ^[1] 34:2</p> <p>continuous ^[3] 46:17,20,24</p> <p>contracts ^[2] 21:22 39:2</p> <p>contradict ^[1] 27:6</p> <p>contrary ^[2] 24:2,3</p> <p>contributed ^[1] 72:12</p> <p>contributory ^[3] 42:4 56:3 67:21</p> <p>core ^[1] 52:12</p> <p>correct ^[3] 9:4 36:2 69:9</p> <p>Counsel ^[13] 5:7 8:13 12:2 16:19 38:16 42:7,14,22 68:3,5 70:19 71: 3 74:16</p> <p>count ^[1] 53:3</p> <p>counts ^[1] 51:19</p> <p>couple ^[4] 9:22 29:7 45:9 63:16</p> <p>course ^[6] 14:15 18:5 28:4 53:11 71:12 73:14</p> <p>COURT ^[47] 1:1,14 3:10 4:6 9:23 10:1,3,7,9 11:10,17,22 15:18 17:3, 6,9,25 18:8,15,25 19:10 20:22 21: 5,8 27:14 37:21 38:1,21 39:5,16, 24 40:18 45:3,25 46:14,18 48:18 49:9 52:22 53:2,12,13 63:25 66: 14,16,24 73:22</p> <p>Court's ^[3] 5:5 31:1 40:25</p> <p>cover ^[2] 26:22 67:11</p> <p>covered ^[26] 5:14 7:19,20,21 12:9, 10,13,20 21:15 25:13,17,24 26:1,5, 6,23 27:18 28:23 59:11,15,22 63: 9,13,15 64:7 69:12</p>	<p>covers ^[1] 4:13</p> <p>create ^[1] 32:11</p> <p>creates ^[1] 73:18</p> <p>credit ^[2] 51:3,5</p> <p>crew ^[6] 9:15 67:2 73:6,6,6,7</p> <p>crews ^[2] 51:11,13</p> <p>Critically ^[1] 4:9</p> <p>cross ^[9] 5:14,23 6:6 7:17 8:2 30:7 31:13 32:4,21</p> <p>cross-cutting ^[1] 69:24</p> <p>crossing ^[13] 4:19 5:11,25 6:22,25 7:3,10,14 24:8 30:5 38:24 55:1 70: 16</p> <p>Crutcher ^[1] 37:7</p> <p>cues ^[1] 16:23</p> <p>Cunard ^[1] 63:9</p> <p>customary ^[9] 42:1 46:2 49:18,22 50:1 51:17 56:3 60:2 67:20</p> <hr/> <p style="text-align: center;">D</p> <hr/> <p>D.C ^[3] 1:10,19 33:4</p> <p>danger ^[1] 55:11</p> <p>day ^[2] 5:22 44:5</p> <p>deal ^[1] 14:13</p> <p>dealing ^[1] 17:24</p> <p>deals ^[1] 46:15</p> <p>decide ^[1] 56:6</p> <p>decided ^[1] 10:2</p> <p>Decision ^[6] 41:13 52:5 67:17 68: 2,10 72:5</p> <p>decisions ^[3] 10:16 59:25 68:10</p> <p>dedicated ^[1] 31:19</p> <p>define ^[1] 10:22</p> <p>defines ^[1] 33:19</p> <p>defining ^[2] 22:14 24:4</p> <p>definition ^[10] 4:3 9:6 15:7 22:5,6 30:25 32:8 33:21,22 34:9</p> <p>delivered ^[1] 52:25</p> <p>demonstrates ^[1] 37:15</p> <p>department ^[1] 61:5</p> <p>depend ^[3] 34:22 41:23 59:13</p> <p>depends ^[1] 6:11</p> <p>description ^[2] 6:16,17</p> <p>design ^[1] 51:25</p> <p>designed ^[1] 40:22</p> <p>destination ^[4] 39:15 44:17 45:8 46:4</p> <p>determining ^[1] 5:11</p> <p>developing ^[1] 40:23</p> <p>difference ^[1] 9:18</p> <p>differences ^[2] 19:17 20:21</p> <p>different ^[14] 10:15 11:13,25 13: 24 32:6,24 36:9 37:19 38:9 46:9 48:12 53:5 54:19 60:11</p> <p>difficultly ^[1] 31:20</p> <p>difficult ^[1] 44:7 45:1 52:2 54:9 55:7,7,15 63:18,22 64:10 69:25</p> <p>difficulty ^[1] 33:9</p> <p>direct ^[1] 28:14</p> <p>directions ^[1] 26:8</p> <p>directly ^[3] 21:19 56:3 67:21</p> <p>disagree ^[1] 22:24</p> <p>discussing ^[1] 68:7</p> <p>discussion ^[5] 18:1 21:6,16 31:10</p>	<p>39:25</p> <p>dispatchers ^[1] 72:6</p> <p>dispute ^[7] 39:11 40:23 50:14 64: 15 67:8 69:15 70:6</p> <p>dissent ^[1] 7:24</p> <p>distinction ^[3] 48:24 61:13 73:5</p> <p>distinguish ^[3] 25:4 32:23 60:19</p> <p>distinguishing ^[1] 42:25</p> <p>divide ^[1] 42:19</p> <p>dock ^[1] 45:20</p> <p>doing ^[19] 11:24 20:23,23 24:3 34: 22 36:6 38:10 41:24 44:12 51:5,6, 17 58:16,22 62:2,2,5 63:3 71:21</p> <p>dormant ^[1] 37:24</p> <p>doubt ^[1] 65:1</p> <p>dozens ^[2] 52:21 61:5</p> <p>drayage ^[3] 34:1,10,15</p> <p>drivers ^[4] 46:11,22 54:6,6</p> <p>dropped ^[1] 60:7</p> <p>dull ^[2] 7:23 8:1</p> <p>duties ^[3] 4:21 34:21 35:2</p> <p>DVORETZKY ^[7] 1:19 2:3,9 3:6,7, 9 5:16 6:9 7:5,9,20 9:8,19 11:5 12: 11,16,19,23 13:11,15,19 14:4,18 15:5 16:12,20 17:13,16 18:10 19: 6 20:3,7 21:10,13 22:4,12,16,21, 24 23:7,10 24:2,17,22 25:15 26:2 27:5 28:4 29:11,22 30:13,16 31:6, 23 32:12,19 33:16 34:6,12,17 35: 19 36:2,20 37:18 42:18 48:4 52: 18 65:18 71:5,7,9</p> <hr/> <p style="text-align: center;">E</p> <hr/> <p>each ^[2] 55:3 65:20</p> <p>easily ^[2] 38:24 53:22</p> <p>Easton ^[1] 37:7</p> <p>edge ^[1] 52:10</p> <p>effect ^[1] 55:25</p> <p>either ^[6] 15:6,7 17:7,18 31:21 70: 11</p> <p>ejusdem ^[2] 47:16 64:1</p> <p>embezzlement ^[1] 17:11</p> <p>emphasized ^[1] 7:10</p> <p>emphasizing ^[3] 4:18 5:10 7:3</p> <p>employed ^[1] 51:21</p> <p>employee ^[9] 33:4 40:1,2 42:15 48:6,7 51:16,20 52:9</p> <p>employees ^[105] 3:23 4:10,17,20 6:1 7:15 9:9 12:24 13:23 14:8,20 15:9,11,13,20 16:25 17:4,17 18:3 19:20 20:17 24:10,14,20,21,23,24 25:1,5,7 28:8,9,19 29:3 31:4,6,12, 17,19,22,24 32:2,3 33:2 35:18,25 36:24 39:2,9 41:12,15,16,17,25 42:16 43:6,7,15 47:19,20,25 48: 11,12 49:20 50:7,13,20 51:22 52: 14 55:24 56:1 57:17,20,25 58:18 59:1,2,16,24 60:17 61:16,23,24 62:3,10 63:3,20 64:14,23 65:6,13 66:3,22,24 67:19 69:6,14,18 70: 13 71:14,22,24 72:4,23 74:13</p> <p>employees' ^[1] 3:24</p> <p>employer ^[3] 15:15 20:14 26:16</p> <p>employer's ^[1] 20:11</p>
---	---	---	--

Official - Subject to Final Review

<p>employment ^[1] 39:1</p> <p>end ^[2] 52:24 56:16</p> <p>ended ^[1] 44:16</p> <p>ends ^[3] 39:14 46:4,5</p> <p>engaged ^[53] 3:19 4:8,16 10:20 11:9 14:16 15:17,24 17:21,21,24 19:10,25 21:1 26:10 37:20 38:11 39:3 40:2,5,10 43:13,16,18 44:10 45:2,14 49:24 50:21 52:15 53:8,14,15 55:1 56:9,10 57:16 59:17 62:10 63:4 64:4,19 66:15,17,18,23 67:1 70:12 71:12,13 72:15 73:25 74:10</p> <p>engages ^[1] 56:19</p> <p>engaging ^[2] 20:13 28:11</p> <p>engineers ^[2] 64:4,25</p> <p>enough ^[1] 74:2</p> <p>ensure ^[1] 49:4</p> <p>entire ^[8] 4:14 25:18,21 28:23,25 73:13,15,16</p> <p>entirely ^[1] 46:19</p> <p>equally ^[1] 9:16</p> <p>Erdman ^[2] 14:6 72:20</p> <p>ESQ ^[3] 2:3,6,9</p> <p>ESQUIRE ^[2] 1:19,21</p> <p>essentially ^[1] 53:20</p> <p>even ^[17] 9:3 24:25 25:16 26:3,3 36:3 40:9,19 43:4 44:18 46:19 48:1,1 54:7 66:21 68:7 72:10</p> <p>eventually ^[1] 7:1</p> <p>everybody ^[14] 14:9 15:15 23:20 25:2,8 49:14,17 50:5,25 63:8,13 64:6 70:7 72:11</p> <p>everyone ^[3] 24:12,14 69:11</p> <p>everything ^[3] 12:3 23:2,15</p> <p>evidence ^[8] 12:7 13:17 14:3,25 15:6 16:3 48:17 70:10</p> <p>exact ^[1] 19:3</p> <p>exactly ^[8] 7:3 13:20 40:21 43:10,14 66:9 67:15,15</p> <p>example ^[15] 13:25 17:5 23:3 32:5 40:9 41:13 45:25 46:10,15 47:22 51:3 54:4,11 55:11 63:7</p> <p>examples ^[1] 71:23</p> <p>except ^[1] 10:20</p> <p>exception ^[4] 27:22,25 28:2,6</p> <p>exceptions ^[1] 32:10</p> <p>exclude ^[3] 14:21 30:24 49:11</p> <p>excluded ^[9] 4:11 25:3 30:8,8 35:9 39:1 42:17,22 72:6</p> <p>excludes ^[1] 66:4</p> <p>executives ^[4] 42:17 50:23 51:1 68:8</p> <p>exempt ^[10] 4:22 15:14 25:18 38:22 39:9 48:7 51:23 58:2 61:7 73:14</p> <p>exempted ^[5] 3:21 13:8,12,22 50:20</p> <p>exempting ^[1] 8:19</p> <p>exemption ^[33] 3:18 4:13 8:6 11:18 12:21 20:15 26:14,18 27:14 29:19 30:9 33:20,21 34:19,20 35:3,8 39:6 40:15,21 49:2,4,16 50:18,24 51:9,14 52:10,12 60:20 69:5 73:</p>	<p>11,17</p> <p>exempts ^[2] 3:11 4:15</p> <p>exist ^[1] 53:12</p> <p>existed ^[1] 50:10</p> <p>existing ^[1] 40:23</p> <p>expert ^[1] 21:23</p> <p>explain ^[2] 29:14 45:18</p> <p>explained ^[1] 5:17</p> <p>extend ^[1] 72:11</p> <p>extensive ^[1] 73:10</p> <p>extent ^[5] 11:14,19 27:18 59:6 60:14</p> <p>extrapolated ^[1] 71:20</p> <hr/> <p style="text-align: center;">F</p> <hr/> <p>FAA ^[16] 3:11 4:22 20:18,25 21:19 27:6,10 28:1 38:23 39:22 40:6,14 48:19 49:1,6 58:8</p> <p>FAA's ^[3] 26:19 27:3,21</p> <p>facilitate ^[1] 5:2</p> <p>fact ^[8] 24:24 26:5,13 30:23 35:1 47:13 53:24 65:2</p> <p>fair ^[1] 28:5</p> <p>fairly ^[2] 27:22 28:2</p> <p>fall ^[8] 29:18 34:8,18,19 50:24 51:8,13 54:15</p> <p>falls ^[1] 49:15</p> <p>far ^[1] 14:21</p> <p>favors ^[1] 40:14</p> <p>federal ^[2] 26:23 73:14</p> <p>FedEx ^[1] 59:22</p> <p>FedEx/UPS ^[1] 34:3</p> <p>FELA ^[14] 10:13,13,16,18 17:23 18:16 19:17,18 20:10,16,22 21:14 52:18,21</p> <p>fellow ^[1] 13:4</p> <p>Ferry ^[2] 37:7 53:4</p> <p>few ^[4] 48:2 49:2 71:10,23</p> <p>field ^[1] 21:15</p> <p>fields ^[1] 37:8</p> <p>figure ^[1] 7:2</p> <p>final ^[4] 39:15 45:8 46:4,5</p> <p>Finally ^[1] 33:24</p> <p>first ^[9] 15:10 20:11 22:13 24:22 47:16 48:3,18 63:1 71:11</p> <p>first-mile ^[1] 46:15</p> <p>flagmen ^[2] 55:10 65:5</p> <p>flight ^[2] 73:6,6</p> <p>flow ^[2] 44:13,14</p> <p>focus ^[2] 28:11 29:1</p> <p>focuses ^[1] 20:10</p> <p>focusing ^[3] 15:23 20:13 26:14</p> <p>folks ^[1] 12:4</p> <p>follow ^[2] 44:1 73:22</p> <p>followed ^[1] 32:13</p> <p>follows ^[1] 3:16</p> <p>foreign ^[44] 3:13,19 4:8,16,18 5:1 7:11 10:20 11:9 15:17,25 17:21 19:11,23 20:8 21:1,22 22:1,10,20 23:8,12,14,19,22,23 24:6 26:10 28:11 36:7 37:20 38:11 39:3 40:10 43:14,19 44:10 53:15 56:10 62:11,22 64:5 71:12 74:10</p> <p>foremost ^[1] 20:11</p>	<p>form ^[1] 61:9</p> <p>forth ^[1] 62:9</p> <p>four ^[1] 6:24</p> <p>Francisco ^[1] 1:21</p> <p>fraud ^[5] 17:6,6,8,8,10</p> <p>freight ^[3] 54:13 59:19 60:13</p> <p>friend ^[1] 47:10</p> <p>full ^[2] 11:14,19</p> <p>function ^[6] 6:6 42:3 54:13 56:4 63:7 71:18</p> <p>functions ^[1] 15:3</p> <p>fundamental ^[3] 10:4,5 30:4</p> <p>furnished ^[2] 23:4,10</p> <p>further ^[1] 37:15</p> <hr/> <p style="text-align: center;">G</p> <hr/> <p>gap ^[1] 26:22</p> <p>gaping ^[1] 73:18</p> <p>gate ^[1] 44:3</p> <p>general ^[12] 27:21,23,24,25 32:25 33:3 42:7,8,14,21 68:3,5</p> <p>generally ^[1] 26:16</p> <p>generis ^[2] 47:16 64:1</p> <p>gets ^[2] 20:16 22:16</p> <p>getting ^[2] 6:17 59:9</p> <p>Give ^[3] 31:3 41:8 71:23</p> <p>given ^[9] 26:12 28:10,11 30:25 37:23 39:13 40:11,15 56:15</p> <p>giving ^[1] 33:14</p> <p>Gloucester ^[2] 37:7 53:3</p> <p>goods ^[22] 3:15 4:4 5:18 28:15 30:22 31:8 39:13 46:11,12 56:12,13,20 57:22,23 58:11 59:4,9 60:16 62:4 73:25 74:4,7</p> <p>goods-focused ^[1] 74:4</p> <p>GORSUCH ^[36] 12:2,14,18,22 13:1,11,14,17 14:1,12,23 16:2,15 21:18 22:9,15,18,22 23:5,8,25 24:11 33:7 37:2 45:4,7 47:4,6,9 48:13 67:3,6,23 68:3 71:1 72:2</p> <p>got ^[3] 24:4 44:16,16</p> <p>governing ^[1] 50:14</p> <p>grammatical ^[1] 22:25</p> <p>green ^[1] 35:24</p> <p>ground ^[2] 73:6,7</p> <p>group ^[5] 6:20,21 55:6 58:13 66:13</p> <p>Grubhub ^[1] 73:23</p> <p>guess ^[3] 19:4 68:20 69:12</p> <p>Gulf ^[2] 19:12 20:24</p> <hr/> <p style="text-align: center;">H</p> <hr/> <p>Hancock ^[2] 46:14,25</p> <p>hand ^[2] 52:11 62:14</p> <p>handle ^[1] 56:11</p> <p>handlers ^[10] 9:7,16 10:22 11:3 25:12,17,24 26:4 55:12 65:14</p> <p>handles ^[1] 56:13</p> <p>handling ^[2] 59:4,8</p> <p>hands ^[2] 13:6 52:24</p> <p>happen ^[1] 38:5</p> <p>happening ^[1] 38:8</p> <p>happens ^[1] 48:9</p> <p>happy ^[1] 5:5</p>	<p>Harbors ^[1] 8:24</p> <p>hailed ^[1] 34:16</p> <p>Haverty ^[3] 9:24 10:1,8</p> <p>Hays ^[1] 53:4</p> <p>head ^[2] 45:16,17</p> <p>hear ^[1] 3:3</p> <p>hearings ^[2] 49:1,3</p> <p>heartland ^[2] 54:7,8</p> <p>held ^[7] 3:18,21 39:16,24 40:22 46:18 52:22</p> <p>help ^[4] 17:2 45:22 47:7,7</p> <p>helpful ^[1] 8:12</p> <p>helping ^[1] 41:6</p> <p>historical ^[1] 67:3</p> <p>historically ^[1] 14:2</p> <p>hold ^[2] 53:2,6</p> <p>holding ^[1] 60:1</p> <p>hole ^[1] 73:19</p> <p>Honor ^[6] 41:4,10 48:16 60:21 62:25 68:18</p> <p>Hours ^[2] 14:5 72:14</p> <p>hundred ^[2] 51:21 56:1</p> <p>hypothesize ^[1] 59:8</p> <p>hypothetical ^[2] 6:10,11</p> <hr/> <p style="text-align: center;">I</p> <hr/> <p>identified ^[3] 49:23 50:9 70:5</p> <p>identifying ^[1] 63:24</p> <p>ignore ^[1] 28:19</p> <p>implied ^[1] 17:8</p> <p>important ^[2] 19:18 36:9</p> <p>include ^[15] 4:9 9:11 10:11 24:12 33:12 47:12 48:22 49:4 62:16 65:13,17 68:23,24 69:11 72:11</p> <p>included ^[9] 9:7,25 41:2,17 44:21 46:8 50:5 51:1 69:7</p> <p>includes ^[5] 32:9 45:19 48:21 62:12,18</p> <p>incorrect ^[1] 71:19</p> <p>Indeed ^[1] 39:16</p> <p>indicating ^[1] 64:11</p> <p>individual ^[5] 16:13 20:18 29:16,24 30:7</p> <p>individuals ^[2] 27:17 35:4</p> <p>industries ^[7] 4:15 28:25 53:25 56:24 57:2,5,21</p> <p>industry ^[17] 4:14 25:19,22 28:23 49:22 55:25 57:6 64:22,24 65:8 66:8 71:17,18,21 73:5,13,16</p> <p>informed ^[2] 17:19 27:9</p> <p>inquiry ^[3] 74:5,6,6</p> <p>Inspection ^[1] 14:6</p> <p>Instead ^[4] 39:1 40:13 46:25 64:13</p> <p>instructive ^[3] 9:21 10:14 12:1</p> <p>instrumentality ^[2] 3:13 38:23</p> <p>integral ^[4] 52:6 60:3,9,13</p> <p>interact ^[1] 11:15</p> <p>interesting ^[1] 21:5</p> <p>intermodal ^[2] 34:4 60:12</p> <p>internal ^[3] 61:17,17 62:5</p> <p>international ^[1] 32:9</p> <p>internationally ^[6] 29:10,14 30:15,24 31:21 32:18</p> <p>interpret ^[4] 24:13,14 26:18 39:6</p>
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Official - Subject to Final Review

<p>interpretation ^[2] 16:14 40:21 interpretations ^[1] 28:7 interpreted ^[3] 20:25 48:19 53:14 interpreting ^[6] 10:16 11:8 18:15, 17,25 37:20 interrupt ^[1] 43:23 interstate ^[68] 3:13,20 4:8,16,18 5:1,11,19 7:11,12 10:21,23,25 11:2,9,24 12:5 13:5 14:16 15:4,18,25 16:9,9 17:22 18:2,4,17 19:11,23 20:6,8 21:1,9 22:1 24:6 26:11 28:12 29:10,13 31:21 32:9 36:7,22 37:10,17,21 38:4,8,12 39:4 40:2,11 43:14,19 44:10 53:14 56:10 59:10 61:11 62:10,21 64:5 67:1 70:12 71:13 74:1,11 intrastate ^[2] 31:19 46:19 invokes ^[1] 40:13 involve ^[2] 6:17 7:14 involved ^[6] 10:23,24 16:9 24:13,15 45:14 isn't ^[8] 6:25 8:23 13:8 25:8 27:22 28:2 32:10 41:19 isolation ^[3] 9:10 12:25 17:18 issue ^[3] 7:13 11:7 14:25 itself ^[6] 21:14 39:20,21 48:2 59:4 66:10</p>	<p>Kagan's ^[1] 68:19 KAVANAUGH ^[24] 17:12,14,20 18:11,22 20:1,5 21:4,11 24:9,19 37:3,4 38:14 39:23 42:23 43:8,20,22,25 44:22 68:19 69:8 71:2 keep ^[3] 17:14,15 19:5 key ^[2] 3:24 54:12 kind ^[5] 5:25 19:13,19 32:11 47:1 kinds ^[1] 46:22 knife ^[2] 8:1,1 Knight ^[1] 46:1 knives ^[2] 7:23,24 knowing ^[1] 53:13</p>	<p>17 53:2,6 66:3 loadmasters ^[4] 54:12,22,22,23 loads ^[1] 48:8 local ^[2] 46:6 47:1 locally ^[1] 13:7 long ^[1] 4:6 Longshore ^[1] 8:24 longshoremen ^[2] 8:23 10:24 look ^[29] 9:5 13:25 14:4,6 21:19 23:1,2 26:7,10,13 28:18,20 29:22,23 30:1,10 41:12 44:13,14 49:1 57:15,19 58:15,16 61:25 62:10,14 66:8 69:19 looked ^[1] 17:6 looking ^[11] 8:7 10:17 20:22 25:6 28:17 47:17,18 50:2 65:3 66:11,22 lose ^[2] 12:10 25:13 lot ^[3] 45:10 49:25 61:18 Lots ^[1] 36:9 Lyft ^[5] 45:11,24 46:21 54:1,5</p>	<p>misunderstanding ^[1] 16:4 modifying ^[1] 23:14 Monday ^[1] 1:11 most ^[4] 6:21 11:1 25:7 57:9 move ^[3] 30:21 31:8 33:25 movement ^[6] 5:18 28:15 72:16 73:25 74:3,4 moves ^[1] 3:15 moving ^[6] 30:22 34:13,16 36:19,21 74:7 Ms ^[56] 38:17,20 41:4,10,23 42:8,11,14 43:4,12,21,24 44:6,24 45:6,23 47:5,8,14 48:3,16 49:17 50:6 51:2,12 52:1 55:20,23 56:7,22,25 57:11,14 58:14,23 59:12,23 60:21 61:2,6 62:24 63:16 64:8 65:11,15,25 67:5,14,24 68:5 69:3,13 71:4,11,25 73:12 much ^[8] 9:15 21:2 44:7,25 63:22 64:9 65:21 72:8 must ^[4] 3:22 40:15 67:20 74:9</p>
<p>J JENNIFER ^[3] 1:21 2:6 38:18 job ^[8] 5:20 6:2,16,16 35:5 44:12 64:12,12 job-specific ^[1] 65:3 Jones ^[2] 48:20 49:10 journey ^[9] 34:2 46:13,18,20,24 59:5 60:8,11,16 Judge ^[4] 3:20 5:17 7:23 73:23 junior ^[1] 6:24 JUSTICE ^[154] 3:3,9 5:7 6:4,10,19 7:6,18 8:11,13 9:8,13 10:19 12:2,14,18,22 13:1,11,14,17 14:1,12,23 16:2,15 17:12,14,20 18:10,22 20:1,5 21:4,11,18 22:9,15,18,22 23:5,8,25 24:9,10,19 25:11,20 26:25 27:20 29:4,5,6,7,15,20 30:10,14 31:3,14,23 32:7,15 33:6,7,16,24 34:10,15 35:11,12,14,15,16,17,22 36:18,25 37:1,1,3,4 38:14,15,20 39:23 41:1,7,18 42:6,9,12,23,24 43:8,20,22,25 44:22 45:4,7,11 47:4,6,9 48:13 49:12,25 50:22 51:10,24 55:18,21 56:5,17,23 57:8,13 58:9,19 59:7,21 60:11,18,22 61:4 62:8 63:8 64:3 65:9,12,16 67:3,6,23 68:3,19,19 69:8 70:18,20,21,22,23,23,25 71:1,2,5,10 72:2 74:8,15 Justice's ^[1] 44:2 juxtaposing ^[1] 29:2 juxtaposition ^[1] 28:10</p>	<p>L Labor ^[8] 41:13 52:4 60:1 67:16,18,25 69:20 72:5 labor/management ^[1] 42:19 land-based ^[2] 4:9,11 language ^[12] 12:9,17 15:21 17:24 18:25 19:3,19 21:1 27:7,8 35:7 36:5 last ^[7] 18:24 33:6 45:20 46:13,15,17,19 last-mile ^[3] 46:11,12,22 lastly ^[1] 20:16 later ^[2] 10:1 26:24 LATRICE ^[1] 1:6 Laughter ^[2] 7:8 12:15 law ^[4] 30:1 31:1,2 39:12 least ^[9] 25:22 47:20 48:22 52:6 56:11 59:25 66:13,20 68:16 leave ^[3] 26:22 44:22,25 left ^[2] 18:23 70:7 legal ^[2] 18:16,18 legs ^[1] 60:11 less ^[2] 14:8 15:10 light ^[1] 35:24 light/red ^[1] 35:24 likely ^[7] 42:15,22 44:18 49:7 57:24 58:1 61:7 Likewise ^[2] 14:10 72:21 limit ^[2] 50:18 69:4 limited ^[3] 67:13,14 70:15 limiting ^[1] 31:4 line ^[3] 63:9,11,12 liner ^[1] 49:15 lines ^[6] 38:24 55:2 56:21 57:10 58:12 70:16 linkage ^[1] 65:1 list ^[3] 9:2 41:16 70:1 listed ^[4] 41:16 69:21,23 70:2 listened ^[1] 18:23 litigation ^[1] 73:10 little ^[2] 41:20 69:9 load ^[6] 4:24 39:9 40:4 48:11 54:14 68:25 loaded ^[3] 43:18 45:13 48:5 loaded/unloaded ^[1] 48:6 loader ^[1] 47:23 loaders ^[11] 4:12,23 8:16 9:11 43:13 45:1,2 52:11 66:9 68:9,11 loading ^[17] 16:8 18:1 21:6,8,24 24:15 35:2 37:9,16 38:2,3,7,10 39:</p>	<p>M made ^[5] 4:7 7:23 28:22 39:5 61:13 main ^[1] 8:14 major ^[1] 57:2 majority ^[1] 27:17 manage ^[1] 51:25 Management ^[2] 25:3,6 Many ^[3] 37:24 53:24 69:18 March ^[1] 1:11 maritime ^[15] 4:10,17 15:13 22:5,8,14 30:1 31:2 33:11,18,19,22 50:2 71:17,18 Mary ^[1] 62:20 matter ^[4] 1:13 21:22 22:19 68:22 matters ^[3] 22:10 23:5,15 mean ^[23] 7:6 12:25 14:8 15:10 17:7,9 18:23 23:20 24:20,23 25:20 30:6 34:24 35:22 36:14 41:5 43:5 50:18 59:7 61:5 62:8 69:4 71:13 meaning ^[8] 16:10 35:19 36:1 37:23 39:7 40:12 42:1 62:23 means ^[6] 3:21 4:20 40:17 67:25 70:12,13 meant ^[8] 4:2 16:24 21:3 25:18 26:21 42:3 59:8 67:20 mechanisms ^[1] 67:8 members ^[1] 6:21 mentioned ^[4] 9:1 18:14 37:5 60:12 mentions ^[1] 49:2 methodological ^[4] 18:12,14 19:7,16 methodologically ^[1] 20:21 middle ^[1] 60:16 might ^[8] 5:21 6:5 7:16,25 8:1 36:10 45:13 65:2 mile ^[4] 45:20 46:13,17,19 miles ^[1] 34:5 mind ^[2] 16:22 45:10 mined ^[1] 61:20 misreading ^[1] 43:2</p>	<p>N namely ^[1] 15:23 narrow ^[10] 16:16 26:12 38:12 40:16 57:7 58:4,5,7,13 62:15 narrower ^[15] 16:22 21:2 43:2,9,10,12 44:1,2,6,9,18 45:15 56:6,7 62:22 narrowing ^[1] 14:20 narrowly ^[3] 16:11 71:25 72:24 nationally ^[1] 32:18 natural ^[1] 25:7 naturally ^[1] 16:7 Neal ^[1] 17:5 necessarily ^[3] 37:11 45:19 47:21 necessary ^[2] 36:4,16 need ^[3] 24:6 36:10 47:13 negligible ^[1] 42:5 nevertheless ^[1] 53:16 New ^[10] 8:18 14:16 27:1,2,15 33:4 39:5 40:19 52:20 67:17 Newlands ^[1] 72:20 next ^[1] 3:4 Ninth ^[1] 7:24 nonetheless ^[2] 30:17 68:25 normally ^[1] 61:15 note ^[3] 53:17 69:17 70:9 noted ^[3] 4:6 8:18 10:7 nothing ^[1] 15:3 noting ^[1] 53:23 notion ^[2] 9:24,25 novel ^[1] 53:25 number ^[11] 10:14 12:25 13:24 20:20 37:6 41:13 53:4,5 55:4,9,14</p>
<p>K KAGAN ^[14] 25:11,20 26:25 27:20 35:16,17,22 36:18,25 51:24 56:5 65:9,12,16</p>			<p>O obvious ^[1] 21:7 Obviously ^[2] 19:18 58:11 occasion ^[1] 18:19 occasionally ^[1] 52:4 ocean ^[1] 49:15 odd ^[2] 32:11 69:9 oddities ^[1] 68:22</p>

Official - Subject to Final Review

<p>oddy [1] 68:20 offered [1] 70:10 office [2] 41:21 62:19 officials [1] 25:5 Oil [2] 19:12 20:24 okay [10] 6:4,8 12:23 13:3 16:2 31:3 33:24 36:25 47:4 60:22 once [1] 52:23 one [26] 5:9 8:18 9:23 15:1 16:25 17:1,4 18:11,18 19:7,8 27:2 33:6 37:12,12 49:3 52:5 55:6 63:17,17 64:2 65:17,18,20 67:11 73:22 ones [2] 6:22 34:25 only [13] 3:11,18 6:20 17:1 21:13 29:12 39:14 52:13,17 59:1 63:17 64:1 66:16 open [2] 44:23,25 opening [1] 5:8 operates [1] 50:3 operation [1] 67:21 operators [3] 30:11 35:18,24 opinion [3] 18:21,21 74:9 opposite [1] 32:16 oral [5] 1:14 2:2,5 3:7 38:18 order [3] 24:7 27:4 68:6 orders [2] 68:1 69:19 ordinary [1] 41:25 other [32] 4:19,25 6:7 15:1,2,2 16:23 18:11 21:21 22:10 23:5 26:8,23 37:5,6,8 39:3,7 42:20 46:22 47:10 50:12,12,20,25 52:11 57:4 60:23 62:14 63:21,23 68:15 others [3] 6:12,23 64:4 ought [4] 17:2 26:17 72:23 73:17 out [11] 7:2 22:7 25:14,16 35:2,3 39:23 42:18 47:7 52:18 54:15 outer [1] 52:9 over [4] 4:5 40:20 55:25 73:10 own [5] 17:7 31:25 57:23 60:24 62:5</p> <hr/> <p style="text-align: center;">P</p> <hr/> <p>p.m [1] 74:18 packages [1] 60:6 PAGE [1] 2:2 paradigmatic [1] 4:5 part [19] 9:14,16 11:24 18:5 21:9 22:13 24:17,18 32:5 33:10,17 34:20 37:10,16 39:18 40:4 46:17,20,23 participation [1] 28:15 particular [14] 5:21,22 6:6 7:13 14:24 15:15,24 33:3 49:5 53:10,12 55:6 71:17 74:12 particularly [4] 26:15 48:25 55:7,8 parts [1] 60:24 passed [4] 26:21 39:8,23 48:19 passenger [1] 63:11 passengers [3] 44:15 46:5 52:7 past [1] 16:4 pejorative [1] 7:7 people [55] 3:15 4:4 5:18 6:7 13:2 15:2 30:22 31:7,8 36:9 38:10 41:6,11,16 42:1 43:17 44:10,19 47:11,21 50:1,18,19 51:4,24 53:7 54:5,19 55:1,11 56:11,20 57:16,21,24 58:1 59:3,8,24 60:1,17 61:7 64:21,23 66:20 67:20 68:12,13,14,24 69:5,14 70:14,15 72:22 percentage [4] 54:3,4 55:2,3 perfect [1] 70:4 perform [2] 3:22 4:21 Perhaps [1] 57:5 period [2] 40:10 70:11 person [14] 13:7,7,9,12,22 29:17 41:8,24 51:15,22 52:8 54:18 55:3 62:18 persons [2] 16:11 72:15 Petitioner [6] 1:4,20 2:4,10 3:8 71:8 phrase [6] 10:19 40:10 43:16 53:14 70:11,13 phrases [1] 5:10 Picking [2] 24:9 58:20 pieces [1] 48:17 pilots [1] 5:1 place [5] 51:20 60:6,10 61:19,20 placed [1] 4:19 plain [5] 17:25 21:5 27:6 37:23 39:24 plane [12] 3:14 6:17 13:9 36:12,17,21 46:3 54:17,23 60:5 72:18 73:3 planes [1] 4:23 please [2] 3:10 38:21 point [13] 7:23 18:14 24:1 26:7,8 32:20 34:7,8 40:9 50:4 51:5 63:10,14 pointed [3] 39:23 42:18 52:18 points [5] 18:10 19:16 27:2 51:3 71:10 position [2] 6:24 13:10 positive [2] 17:7,9 possible [3] 25:24 40:16 52:8 potential [1] 69:22 potentially [3] 64:9 65:2 69:13 power [2] 11:15,20 practical [1] 18:18 practically [2] 18:4 21:9 pre-1925 [1] 37:6 pre-existing [1] 50:8 precedent [3] 18:25 19:2 37:5 precise [1] 5:9 predominant [1] 30:19 predominantly [3] 4:2 10:6 73:3 preexisting [1] 64:15 premise [1] 48:14 presents [1] 53:18 pretty [2] 23:22 62:15 primary [1] 35:5 Prime [7] 8:18 27:1,2,15 39:5 40:19 67:17 principle [1] 31:4 principles [1] 52:20 privilege [1] 40:20 pro-arbitration [1] 26:19 probably [2] 44:21 67:6 problem [1] 53:25</p>	<p>proceedings [1] 8:21 products [2] 57:9 58:20 program [2] 51:3,5 promote [1] 27:11 proper [1] 27:22 properly [1] 74:13 proposes [1] 40:12 proposing [1] 67:16 provisions [2] 27:24 28:1 public [3] 57:22 61:14 62:4 Puget [8] 9:14,20,23 10:9,12 11:6,23 66:25 purpose [8] 8:19 10:18 27:13,16,16 40:14,20 73:12 purposes [7] 22:2 26:19 27:3,6,21 40:6 73:19 purposive [3] 10:17 18:21 20:24 put [4] 6:23 13:3 41:20 58:20 putting [1] 50:4</p> <hr/> <p style="text-align: center;">Q</p> <hr/> <p>qualify [1] 29:18 Queen [1] 62:20 question [32] 5:17,23,24 8:9 9:21 11:1,7,13,20 12:4,12 13:14 16:5 24:10 33:6 37:19 38:9 44:4,8,8 45:1 46:23 47:5 52:2,3 57:15 61:8 62:7 64:10 66:25 67:4 68:20 question's [1] 19:1 questions [6] 5:6 29:7 40:25 44:2 70:20,21 quite [5] 29:8 49:7 55:15 58:4 61:22 quote [1] 21:16</p> <hr/> <p style="text-align: center;">R</p> <hr/> <p>rail [2] 16:24 24:20 railcars [1] 72:22 railroad [144] 3:23,24 4:20 6:1 7:15 8:17,21 9:6,9,16 12:8,24 13:6,23 14:8,9,20 15:9,11,20 16:24 17:3,17 19:20 20:12 24:10,14,16,20,21,23,24 25:2,5,7,9,12,16,23 26:4 28:8,9,19 29:2 31:4,6,12,12,16 32:1,3 33:2,4 36:8,23 39:2 40:1,1 41:12,13,15,25 42:2,5,15,16 43:7,15,18 46:3,12,13,16,25 47:19,20,25 48:5,12 49:20 50:7,13,19 51:16,18,20 52:14 54:9 55:8,25 57:17,20,24 58:18,25 59:2,16,18,24 60:1,2,3,17 61:10,10,16,24 62:3 63:3,20 64:4,6,14,22,24,25 65:5,6,13 66:2,21,24 67:9,11,12,16,18,19,22,25 68:17,24 69:6,14,18,20 70:13 71:14,22,24 72:4,13,23 74:12 railroads [4] 61:13,17,18,22 rails [1] 31:7 Railway [5] 35:17,18,25 52:4 72:5 railyard [1] 45:21 raises [1] 68:20 ramp [6] 6:15 8:8 25:22,23,25 35:5 65:23 72:9 ran [1] 31:15 rather [10] 10:17 15:16,25 22:3 23:15 26:15 27:11 42:5 55:2 70:14 reach [2] 11:19 18:7 reaches [1] 3:18 read [10] 9:9 12:24 16:25 17:1,9,18 24:20 27:21,23 28:1 reading [4] 16:18 25:8 28:5 40:16 realize [1] 17:23 really [14] 9:21 23:14 42:17 44:15 47:1 52:6,9 54:12 57:7,20 58:3 61:21 62:2,5 realm [1] 9:4 reason [9] 26:20 42:15,21 49:3 50:12 51:14 64:10 69:22 70:3 reasons [4] 9:22 10:14 62:25 63:17 REBUTTAL [4] 2:8 71:6,7,10 received [1] 39:15 recognize [1] 55:16 recognized [1] 10:1 recommend [1] 55:22 reference [2] 19:12 22:4 referred [2] 45:12 72:22 referring [1] 12:19 refers [1] 25:1 refined [1] 61:21 reflected [1] 63:23 reflects [1] 37:15 regardless [2] 40:16 48:9 regime [2] 26:24 73:15 regimes [1] 40:24 regulate [1] 38:2 regulated [1] 61:11 regulating [1] 38:6 reiterated [1] 10:3 rejected [2] 19:13 40:18 related [3] 18:3,6 36:3 relating [1] 21:21 relied [1] 10:13 relies [1] 10:9 relying [3] 9:24 52:21 53:1 repair [2] 23:18,21 repairing [1] 23:21 repairs [2] 23:4,11 repeated [1] 8:14 repeatedly [3] 39:16 63:25 66:14 repeating [2] 7:10 24:5 repeats [1] 4:18 repetition [1] 20:8 require [5] 5:13 18:1 21:6 28:14 39:24 requires [1] 5:4 residual [7] 19:21 20:9 66:20 69:1,7 70:7 71:20 resolute [1] 50:14 resolution [3] 40:24 64:15 70:6 resolutions [2] 67:8 69:15 resolve [1] 26:9 respect [6] 8:21 15:1 28:21 71:15,22 73:1 Respondent [4] 1:7,22 2:7 38:19 response [1] 37:13 rest [2] 24:3 60:10 retail [2] 58:24 59:14 Rhodes [1] 47:23</p>
--	---

Official - Subject to Final Review

<p>ride ^[2] 31:7 54:17 rides ^[1] 54:3 riding ^[1] 35:20 RLA ^[2] 24:25 25:3 ROBERTS ^[25] 3:3 5:7 6:4,19 7:6, 18 8:11 29:4 35:12 37:1 38:15 41:1,7,18 42:6,9,12 58:9,19 59:7,21 70:18,23 71:5 74:15 rode ^[1] 47:11 role ^[2] 72:8,9 route ^[1] 56:6 rug ^[1] 7:4 rule ^[4] 3:16 53:19,21 73:9</p> <hr/> <p style="text-align: center;">S</p> <hr/> <p>sailed ^[1] 4:6 same ^[22] 6:12,16 11:3,7 13:8,9 19:9,24 20:4,8 43:15 46:24 47:18 49:9 54:18 55:24 57:3,17 61:23 66:9,18 71:14 San ^[1] 1:21 satisfies ^[1] 8:5 satisfy ^[1] 30:17 Savannah ^[3] 31:15,25 33:5 SAXON ^[5] 1:6 3:5 4:13,22 48:3 saying ^[9] 6:5 11:22 13:3 27:19 32:8 38:1 63:3 68:1,11 says ^[11] 4:13,17 18:8 21:5 22:9,11,13 40:15 46:1 52:6 65:5 schedules ^[2] 51:11,13 schemes ^[1] 70:6 scope ^[5] 11:18 27:4 51:9 72:7 73:10 seaman ^[4] 29:17,18 30:2,7 seamen ^[108] 3:23,24 4:1,5,7,9,10,17 5:1 6:1 7:15,16 8:2,4,16,22 9:1,25 10:5,10,23 15:13,20 16:25 17:2,19 19:20 24:5,12 26:6 28:10,18,19 29:3,9,11,25 30:4,12,25 31:1,11 32:21,21,24,25 34:9,11,21,25 35:10 36:8,23 39:2 43:15 47:6,11,19,25 48:4,12,15,20,22 49:8,13,20,21 50:4,5,6,13,19 57:17,20,25 58:17,25 59:2,16 61:16 62:3,15 63:2,14 64:4,13,21 65:4,5,17 66:2,4,19,21,23 67:9 68:23 69:5,10,14 70:13 71:14,15,15 72:23 73:7 74:12 seamen's ^[1] 34:21 Second ^[2] 15:12 34:1 Section ^[40] 3:11,17 4:14 8:6 9:10 11:18,18 12:20 13:13,23 15:7 16:14 19:17,20 20:14 21:20 22:2,7,13 25:10 26:14,18 27:4,7,8,13,18 33:18,20,25 34:18,20 35:7,20 36:1,6 38:13 73:11,17,20 see ^[7] 8:13 9:17 41:15 58:16 62:1,18 69:20 seem ^[1] 5:9 seems ^[4] 22:3 33:10 49:7 62:9 sells ^[1] 62:19 senior ^[1] 6:21 sense ^[8] 7:7,22 18:16,18 19:3 23:17 48:23 70:4 separate ^[5] 25:14,16 47:1 48:10,</p>	<p>15 separately ^[1] 33:18 separating ^[1] 22:7 served ^[1] 72:22 serves ^[1] 63:6 Service ^[3] 14:5 46:7 72:14 services ^[1] 28:16 set ^[1] 41:14 several ^[1] 20:2 Shanks ^[6] 18:6,14,15,20 19:6,14 sharp ^[2] 7:25,25 SHAY ^[5] 1:19 2:3,9 3:7 71:7 she's ^[1] 48:7 shed ^[1] 65:1 shift ^[1] 62:9 ship ^[11] 3:14 10:6 34:5,7 35:1,6 36:21 45:13 58:21 67:2 72:19 shipment ^[2] 18:2 56:19 shipments ^[1] 60:6 shipped ^[2] 57:21 61:14 shipping ^[11] 24:13 49:14,22 57:23 58:11 60:24 62:4 63:11,12 64:22 69:12 ships ^[6] 3:25 4:24 8:4 11:1 50:3 57:9 shore ^[1] 33:13 show ^[1] 70:14 shows ^[1] 15:14 side ^[2] 37:6 65:20 side's ^[1] 47:10 signal ^[2] 35:17,23 signalman ^[1] 47:22 significance ^[1] 24:7 similar ^[5] 17:24 18:24 19:3 58:17 64:20 similarly ^[2] 4:20 58:1 simply ^[5] 11:20 38:9 56:8 71:21 74:2 single ^[1] 40:9 sitting ^[1] 14:16 situation ^[2] 18:24 38:6 six ^[2] 59:25 68:10 sky ^[1] 54:15 somebody ^[3] 41:19 51:11,12 somehow ^[1] 23:20 someone ^[2] 16:8 45:13 sometimes ^[6] 32:21,22 54:16,16,18,19 somewhere ^[1] 58:21 sorry ^[2] 17:15 43:22 sort ^[4] 7:14 46:6,22 47:1 SOTOMAYOR ^[5] 8:13 9:8,13 10:19 35:15 Sound ^[9] 9:14,20,23 10:9,12 11:6,23 58:12 66:25 sounds ^[1] 20:5 SOUTHWEST ^[14] 1:3 3:4 39:11 40:3,8,13,15 51:2,6,25 53:9,18 54:23 70:10 Southwest's ^[6] 40:20 53:20 54:2,10,20 55:16 space ^[1] 57:5 speaking ^[1] 16:1 speaks ^[2] 21:20 28:25</p>	<p>special ^[1] 8:20 specific ^[4] 15:16 22:3 65:7 71:23 specifically ^[9] 14:2,13 39:17 45:24 50:15 53:3,7 70:1,5 specifying ^[3] 4:10 24:5 63:14 spend ^[2] 30:19,21 spending ^[1] 10:6 stand ^[1] 44:5 standard ^[1] 19:13 standing ^[1] 17:7 start ^[3] 18:13 43:16 56:14 started ^[1] 44:15 state ^[8] 12:6 38:1,24 55:2 56:20 57:9 58:12 70:16 state's ^[1] 11:16 STATES ^[5] 1:1,15 14:10 20:2 46:1 Station ^[5] 41:17 46:5,6 47:23 68:15 statute ^[21] 13:20 16:19 17:10 19:4 23:1 26:21 27:23 28:14,24 32:21,23 39:7 40:8 53:11,12 58:2 66:10 68:21 74:5,5,6 statute's ^[1] 40:14 statutes ^[5] 14:7,19 50:14 64:15 69:15 statutory ^[6] 10:15 11:8 12:9,17 15:8 16:20 stevedore ^[1] 48:3 stevedores ^[34] 4:11,24 8:15,25 9:2,3,13,25 10:11 11:23 26:5 35:5,8 47:12 48:2,10,14,21,23 49:5,11,13 62:16,17 65:18 66:5 67:1 68:23,25 69:16,17,18,20,23 still ^[10] 8:1 12:4 26:5,10,13 29:17 32:1 46:20 57:7 58:4 stopping ^[1] 38:7 stored ^[1] 60:7 stores ^[1] 61:5 strongest ^[1] 47:10 structure ^[2] 3:17 16:21 subject ^[2] 35:8 49:5 submit ^[1] 28:5 submitted ^[2] 74:17,19 subordinate ^[1] 25:5 subsequent ^[1] 68:2 succinctly ^[1] 55:19 suggest ^[3] 29:9 33:10 65:2 suggested ^[1] 73:13 suggesting ^[3] 37:9 72:1,25 suggests ^[4] 15:22 16:21 21:11 23:13 suited ^[1] 18:19 supervisors ^[5] 6:15 8:8 25:23 65:24 72:9 supervisory ^[2] 72:8,9 supplies ^[2] 23:3,10 support ^[1] 40:7 supportive ^[1] 42:10 supports ^[1] 27:8 suppose ^[2] 34:22 64:3 supposed ^[2] 26:12 28:3 SUPREME ^[2] 1:1,14 surplusage ^[2] 62:21 63:1</p>	<p>surprised ^[1] 8:25 sweep ^[1] 7:4 sweeping ^[3] 16:13,16 23:23</p> <hr/> <p style="text-align: center;">T</p> <hr/> <p>talked ^[1] 32:24 talks ^[3] 19:24 20:12,17 taxi ^[1] 46:6 team ^[2] 6:7,13 technical ^[2] 18:16,18 tells ^[3] 63:2 66:4,11 tenuously ^[1] 51:7 term ^[10] 4:1 9:9 11:9,11 15:9 25:7 28:13 37:22 38:13 65:12 terms ^[8] 10:17 18:20 21:12 28:24,25 45:24 62:12 72:15 test ^[30] 5:3,13 18:6,7 21:14,17 30:18 36:3,4,18,20 51:19 53:19,21 54:2,10,20,25 55:16,19,21,24 56:6,8,18 57:7 67:15 72:17 73:2,23 Texas ^[1] 37:7 text ^[6] 3:17 10:15 16:21 40:8,17,20 textual ^[4] 18:11,20 19:17 22:3 textually ^[2] 20:20,23 themselves ^[5] 38:11 58:6 66:15 70:6 74:10 theory ^[1] 24:11 there's ^[7] 10:25 25:13 26:20 27:23,24 40:7 72:4 therefore ^[1] 17:1 they'll ^[1] 6:25 thinking ^[1] 50:15 Thomas ^[19] 29:5,6,20 30:10,14 31:3,14,23 32:7,15 33:6,16,24 34:10,15 35:11 60:11 70:20,21 though ^[4] 15:8 45:5 46:19 48:14 three ^[1] 6:24 throw ^[1] 62:17 ticket ^[9] 36:11 41:2,5,8,20 44:4,19,20 62:19 today ^[5] 8:15 33:21 52:4 60:5 62:12 together ^[1] 28:20 took ^[2] 19:6 46:12 trade ^[1] 19:25 traditional ^[1] 30:1 train ^[20] 3:14 4:21 9:15 31:8,8,15,17,19,24 35:21,23 39:25 55:10,12,13 68:13 72:6,17,19 73:3 trains ^[2] 3:25 43:18 transaction ^[2] 22:14 33:11 transactions ^[5] 22:6 33:18,19,23 58:7 translate ^[1] 73:4 transport ^[1] 41:2 transportation ^[47] 3:20 4:8,16 5:2,3,25 8:19 9:2,17 18:4 25:4 36:4,7,10,15 37:8 39:12,18,19,19,20 42:4,13 46:3,8 47:2 51:6 52:7,23 56:4,14,15,20 58:5 59:3,10 60:4,5,12 61:12 63:5 68:16 72:3,3,7,10 73:24 transported ^[1] 4:3</p>
--	--	--	--

Official - Subject to Final Review

<p>transporting ^[1] 4:4</p> <p>travel ^[11] 8:4 11:2 13:2 29:9 30:15 32:9,17 36:10,13,14 57:5</p> <p>traveled ^[1] 29:13</p> <p>traveling ^[2] 31:21,22</p> <p>treated ^[1] 31:20</p> <p>truck ^[2] 34:16 36:22</p> <p>Trucking ^[9] 14:11 57:3 60:4,19,19,23 73:13,15,16</p> <p>true ^[2] 53:24 55:4</p> <p>try ^[1] 12:14</p> <p>trying ^[6] 7:2,4 15:14 27:10 29:14 31:18</p> <p>tugboat ^[1] 30:11</p> <p>two ^[19] 9:2 16:25 18:10 19:16 25:14,16 26:7 28:7,7 42:24 47:14,14 48:17 57:1 62:25 64:14 65:10,23,25</p> <p>type ^[1] 7:13</p> <p>types ^[1] 32:24</p> <p>typically ^[6] 8:5 24:25 30:5 31:9 32:3 46:7</p> <hr/> <p style="text-align: center;">U</p> <hr/> <p>Uber ^[5] 45:11,24 46:21 54:1,6</p> <p>Um-hum ^[1] 65:15</p> <p>under ^[20] 7:4 11:21 26:11 29:18 30:18 31:1,2 35:6 36:5,5 41:3 51:19 52:4 53:10 55:15 61:11 72:3 74:5,5,6</p> <p>undermine ^[1] 27:11</p> <p>undermining ^[1] 73:19</p> <p>underscore ^[1] 24:7</p> <p>understand ^[13] 14:1 16:7 17:3 21:23 22:15 23:25 31:18 33:15 45:12,15 61:15 62:11 63:22</p> <p>understanding ^[17] 10:10 15:19 16:22 17:2,3 21:3,12 22:25 23:23 27:9 28:9,12 29:12 30:2 33:9 37:16 46:2</p> <p>understood ^[12] 46:7 49:9 50:8 56:9 61:15,22,24 64:16 68:8 71:24 72:24 74:13</p> <p>UNITED ^[4] 1:1,15 14:10 45:25</p> <p>unless ^[4] 16:4 35:23 62:20,21</p> <p>unload ^[5] 12:4 39:9 40:4 48:11 68:25</p> <p>unloaded ^[4] 39:25 43:18 45:13 48:5</p> <p>unloading ^[20] 13:9 16:8 18:2 21:7,8,25 24:15 34:25 35:2,6 37:9,16 38:2,3,7,11 39:17 53:2,6 66:3</p> <p>unloads ^[2] 13:4 48:8</p> <p>unsettle ^[1] 40:23</p> <p>until ^[1] 52:25</p> <p>up ^[9] 22:5 24:9 41:8 44:1 52:3 61:9,9 65:19 70:8</p> <p>UPS ^[1] 59:21</p> <p>uses ^[1] 38:13</p> <p>using ^[3] 10:9 20:25 49:8</p> <hr/> <p style="text-align: center;">V</p> <hr/> <p>vast ^[2] 21:15 27:17</p> <p>version ^[1] 45:15</p>	<p>versus ^[3] 3:5 14:10 17:5</p> <p>vessel ^[8] 4:3 23:18,22 30:5,20 47:21 55:1 70:16</p> <p>Vessels ^[6] 4:3 23:4,4,11,11 30:20</p> <p>view ^[1] 69:1</p> <p>virtually ^[1] 11:1</p> <p>virtue ^[2] 23:21 53:18</p> <p>voyages ^[1] 4:6</p> <hr/> <p style="text-align: center;">W</p> <hr/> <p>wage ^[1] 69:19</p> <p>wages ^[1] 41:14</p> <p>Wallace ^[2] 3:21 5:18</p> <p>wanted ^[3] 13:16,20 38:22</p> <p>wants ^[1] 5:14</p> <p>warehouse ^[8] 58:24 59:1,5,9,14,19 60:13,15</p> <p>warning ^[1] 55:11</p> <p>Washington ^[2] 1:10,19</p> <p>water ^[3] 4:5 30:22 34:14</p> <p>wave ^[1] 27:3</p> <p>waves ^[1] 47:12</p> <p>way ^[36] 15:1,7 17:1,18 19:10,24 20:14,24 25:13,15,24 27:22 32:11 36:7 38:12 43:15 46:24 49:9,23 57:17 58:15 59:17 61:2,23 63:3 64:18,19 66:18 67:15 71:14 72:11,12,24 73:4,18 74:11</p> <p>ways ^[2] 13:24 16:25</p> <p>website ^[1] 51:25</p> <p>welcome ^[1] 40:25</p> <p>wharfage ^[11] 21:20,21,22 22:5,9,19 23:3 33:8,12,17,25</p> <p>Whatever ^[4] 16:16 27:20 42:10,13</p> <p>whereas ^[1] 20:18</p> <p>Whereupon ^[1] 74:18</p> <p>whether ^[19] 5:18,24,24,24 6:11 8:9 12:20 19:1,2 33:3 36:6 38:10 45:19 49:12 54:25 57:15 58:17 59:13,17</p> <p>who's ^[3] 24:15 34:22 69:11</p> <p>Wilander ^[5] 10:2,4,8 30:3,19</p> <p>will ^[5] 52:2 53:21 54:1 57:5 73:10</p> <p>win ^[1] 65:16</p> <p>wins ^[1] 65:18</p> <p>wish ^[1] 22:22</p> <p>within ^[14] 5:22 9:5 16:10 34:8,18,19 35:19,25 49:16 50:24 51:8,13 69:12 71:18</p> <p>without ^[2] 36:13 38:3</p> <p>word ^[10] 15:13 17:6,11 19:22,23 26:6 32:20 48:19 49:8 50:2</p> <p>words ^[9] 4:20 7:11 21:3 23:2 26:8 39:8,8 53:16 70:15</p> <p>work ^[33] 3:12,22 4:23,24 8:10 29:1 31:24 34:23 41:6 42:2,9 49:18,22 50:1 51:4,6,17 56:2,3 57:11 60:2 61:1 62:3,6 64:21,23 66:7 67:21 68:17 71:16,21 72:12 73:3</p> <p>worked ^[10] 4:2 55:11,13 57:21 59:3 63:9,13 64:6 67:12 68:16</p> <p>worker ^[7] 5:13,21 6:5,11 36:15 39:25 46:25</p>	<p>worker's ^[1] 8:24</p> <p>workers ^[81] 3:12,19,22 4:2,15,21,25 5:20 6:3,12 8:8,17,20,21 9:3,6 10:20 12:8 14:13,24 15:22,23,24 17:20,21 20:19 25:22,25 26:15,22 29:1,23,25 32:1 36:8 38:23 39:3 40:3,5 41:3 42:20 43:1 44:12 46:12,16,21 49:21 50:9,10,21 54:5,8,8,21 55:6,9,14 56:8 58:5,6,6,10,24 59:1,14,18,18 62:2 63:21,24 64:14 65:7 66:14,23 67:10,11 68:24 69:24 73:2,24 74:9</p> <p>working ^[3] 3:25 30:5 62:21</p> <p>works ^[6] 14:9 15:15 25:2,8 49:14 50:23</p> <p>world ^[1] 50:11</p> <p>worth ^[1] 53:23</p> <p>wow ^[1] 62:12</p> <p>wrap ^[1] 70:8</p> <p>wrongly ^[1] 10:2</p> <hr/> <p style="text-align: center;">Y</p> <hr/> <p>yard ^[1] 68:14</p> <p>year ^[2] 39:22 48:18</p> <p>years ^[4] 6:24 26:24 51:21 56:1</p> <p>Yellow ^[1] 46:1</p> <p>York ^[2] 14:16 33:4</p>
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